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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-616

MOHASCO CORPORATION,

Petitioner,

vs.

RALPH H. SILVER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Mohasco Corporation (hereinafter "Mohasco") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 18, 1979.

OPINIONS BELOW.

The Opinion of the District Court for the Northern District of New York of October 17, 1978, granting Mohasco's Motion for Summary Judgment, is reported unofficially at 19 FEP Cases 677 and is reproduced in Appendix A herein (App. A1 - A22). The Opinion of the Court of Appeals of July 18, 1979, reversing the trial court, is unofficially reported at 20 FEP Cases 464 and 20 CCH EPD ¶30, 137, and is reproduced in Appendix A herein (App. A23 - A44).

JURISDICTION.

The opinion by a divided panel of the Court of Appeals was entered on July 18, 1979 (App. A23 - A44). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

(1) (a) Whether the Court of Appeals for the Second Circuit erred in holding that in enacting Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e, *et seq.* (hereinafter referred to as "Title VII"), Congress intended the word "filed" to mean different things in Title VII §§ 706(c) and (e), 42 U.S.C. §§ 2000e-5(c) and (e) (hereinafter referred to as "§ 706(c)" and "§ 706(e)" respectively), so that a charge is "filed" on receipt by the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") for purposes of calculating the § 706(e) limitations period, but "filed" only after the expiration of the period of deferral to the State agency for § 706(c) purposes;
or
(b) If the Second Circuit did not err in so holding, whether it erred in further holding that the charging party may take advantage of the extended 300-day limitations period (granted by § 706(e) to a charging party who has "initially instituted" state proceedings) in spite of the fact that the initial "filing" with the EEOC preceded the institution of proceedings before the State agency so that, in effect, the charging party "initially instituted" federal rather than state proceedings.

(2) Whether the Second Circuit erred in holding the Respondent's allegations of post-employment discrimination were within the scope of a reasonable EEOC investigation and, therefore, the district court could consider such claims, even though the EEOC charge specifically related only to allegations of discrimination during the period of the Respondent's employment, no notice was given to Mohasco of such allegations, and the EEOC's determination of no reasonable cause made no reference to such allegations.

STATUTES INVOLVED.

This case involves the interpretation and application of the provisions of Title VII of the Civil Rights Act of

1964 as amended, 42 U.S.C. §2000e *et seq.*, specifically Title VII § 706(c), 42 U.S.C. § 2000e-5(c) and Title VII § 706(e), 42 U.S.C. § 2000e-5(e). These statutory provisions are reproduced in full in Appendix B (App. A51 - A52).

STATEMENT OF THE CASE.

Respondent Ralph H. Silver (hereinafter "Silver") was employed by Mohasco on July 15, 1974. His employment relationship with Mohasco was terminated on August 29, 1975. Silver submitted a letter to the EEOC, which is shown to have been received by the EEOC on June 15, 1976, 291 days after Silver's termination. This letter alleged that Silver ". . . was both hired and fired because of [his] religion", and specifically detailed an alleged plan pursuant to which he claimed Mohasco had created the position to which he was hired as a ". . . ['minority slot'] to give token compliance with job anti-discrimination legislation. . .".

Because the New York State Division of Human Rights (hereinafter "Human Rights Division") is (and was at that time) a "706 Agency" under the EEOC's regulations, 29 C.F.R. § 1601.12(m) (1977), the EEOC forwarded Silver's letter to the Human Rights Division by Notice of Deferral Transmittal dated June 15, 1976. In apparent recognition of the unambiguous language of § 706(c) that ". . . no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law . . . ", the EEOC's Notice of Deferral included a statement that:

> "This charge is being deferred to your agency pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended. The Commission *will* automatically *file* this charge at the end of the deferral period, unless we are notified before the expiration of that period that your agency has terminated its proceedings."
>
> (Emphasis added.)

The Human Rights Division, by letter to Silver dated June 18, 1976, advised Silver of its receipt of his letter to the EEOC, and stated that:

> "You are invited to visit this or any other regional office of the Division to file a complaint."

and that:

> "It is requested that you file a complaint with this Division within 30 days."

On August 12, 1976, 55 days later and 349 days after the termination of his employment with Mohasco, Silver filed a verified complaint with the Human Rights Division alleging essentially the same claim of employment discrimination because of his religious faith as had been raised in his letter to the EEOC.

Sixty-six days after the EEOC mailed its "Notice of Deferral Transmittal" to the Human Rights Division, the EEOC, by Notice of Charge of Employment Discrimination dated August 20, 1976, notified Mohasco that Silver had filed a charge against Mohasco alleging employment discrimination under Title VII. *See* 29 C.F.R. § 1601.13 (1972) (respondent to be served by EEOC with copy of charge within 10 days of filing) and § 1601.12(b)(1)(iv) (1975) (60 day deferral period to commence upon EEOC mailing of charge to 706 Agency). That Notice showed only that Silver's charge related to a discharge from employment, because of Silver's religion, on August 29, 1975. By a form letter of the same date over the signature of Edwin C. Casler, the Regional Director, the EEOC notified Silver that the EEOC had sent such Notice to Mohasco.

By letter dated August 3[1], 1976 to Mr. Casler of the EEOC, Silver stated:

> "In reply to your letter dated August 20th, I am forwarding you a copy of my letter dated August 31 addressed to Mr. Dorman Avery of the State Division of Human Rights."

In this August 31 letter to the Human Rights Division, Silver stated, among other things:

> "I believe that I was given a bad reference by Mohasco. What exactly the reference was ought to be investigated."

The EEOC did not notify Mohasco of its receipt of this letter, and did nothing to indicate Silver had amended his original charge or had filed a new charge.

On February 9, 1977, the Human Rights Division issued its determination, which is reproduced in full in Appendix A herein (A45 - A46), that there was no probable cause to believe Mohasco had engaged in the unlawful discriminatory practice complained of by Silver. This determination states, in pertinent part:

> "Complainant herein alleges that he was terminated from employment because of his creed. Respondent has officers and upper/middle management personnel of complainant's stated religious faith. It cannot be ascertained that complainant's employment was terminated for reasons other than management's judgment that his job performance was unsatisfactory."
>
> (A45)

This determination was upheld by Order of the New York State Human Rights Appeal Board on December 22, 1977, which is reproduced in full in Appendix A herein (A47 - A48).

On August 24, 1977, the EEOC, over Mohasco's jurisdictional objection that Silver had failed to file a timely charge with the EEOC, issued its "no reasonable cause" determination, which is reproduced in full in Appendix A herein (A49 - A50). This determination states, in pertinent part:

"Substantial weight has been accorded the findings of the New York State Division of Human Rights, which are attached. Having examined the New York State Division of Human Rights' findings and the record presented, I conclude that there is not reasonable cause to believe the charge is true."

(A49)

On the same day, the EEOC mailed to Silver notification of his right to commence a civil action within ninety days of his receipt of such notice. Ninety-one days later, on November 23, 1977, Silver commenced this action by filing a complaint in the United States District Court for the Northern District of New York, citing Title VII as the sole basis for this action.

By Memorandum-Decision and Order dated October 17, 1978, the Honorable James T. Foley, of the United States District Court for the Northern District of New York, granted Mohasco's motion for summary judgment on the grounds that Silver failed to make a timely filing of his charge with the EEOC, and that the court therefore lacked subject matter jurisdiction with respect to Silver's claims against Mohasco.

Judge Foley also concluded that because Silver's charge sent to the EEOC and forwarded to the Human Rights Division did not allege a continuing or post-employment violation of Title VII, allegations in Silver's complaint of continuing and post-employment discrimination should be dismissed for lack of subject matter jurisdiction.

On appeal, a divided Second Circuit, on July 18, 1979, reversed the decision of the district court and held Silver's charge was timely filed with the EEOC. In this respect, Chief Judge Kaufman, writing for the majority, stated:*

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* Chief Judge Kaufman was joined in his opinion by Judge Oakes. Judge Meskill filed a separate opinion dissenting in part and concurring in part.

"We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is ' filed ' for purposes of § 706(e) when received, and ' filed ' as required by § 706(c) when the state deferral period ends."

(A29)

Further, the Second Circuit unanimously held that on remand the district court could properly consider Silver's allegations of "blacklisting" and post-employment discrimination. (A35-A36; A37-A38, n.2).

REASONS FOR GRANTING THE WRIT.

I. The "Filing" Issue.

A. A Clear Division of Opinion Exists Between the Circuit Courts of Appeal on the Issue of When a Charge is "Filed" With the EEOC.

Four other circuits have considered the precise timeliness question presented by this case. One Circuit has rendered a decision diametrically opposed to the view expressed by the court below. *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972) (Stevens, J.). Three circuits have issued decisions that support the result rendered in the decision below. *See Vigil v. American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972); and *Richard v. McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972). However, the Eighth Circuit, sitting *en banc*, has since rendered an opinion sharply retreating from its position in *Richard, supra. Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975). These five decisions cannot be reconciled.

The Tenth Circuit, in *Vigil, supra*, 455 F.2d at 1224-25 held that: (1) the submission of a complaint to the EEOC during the deferral period provided by § 706(b) [now § 706(c)] fulfilled the requirement of § 706(d)

[now § 706(e)] that a charge be "filed" within 210 [now 300] days of the date of the unfair employment practice complained of, even though the EEOC could not proceed with its investigation until after the 706 Agency had had the complaint for 60 days; and (2) in any event, the submission "tolled" the running of the 210 day limitations period.

The Sixth and Eighth Circuits, when confronted with similar situations, followed *Vigil,* but *only* with respect to *Vigil's* holding that the submission of a charge to the EEOC before deferral to the 706 Agency "tolled" the running of the 210 day filing period then prescribed by § 706(d) [now § 706(e)]. *Anderson, supra,* 464 F.2d at 725 (6th Cir. 1972) ("Submission of the original charge tolled the 210 day time limit."); *Richard, supra,* 469 F.2d at 1251 (8th Cir. 1972) (" ... initial receipt of the original charges by the EEOC serves to toll the statute of limitations.").

However, an *en banc* Eighth Circuit, in *Olson, supra,* 511 F.2d at 1231-33 (8th Cir. 1975), has since substantially retreated from its decision in *Richard,* stating:

> "... [I]t would not be in keeping with the intent of Congress to allow one individual 300 days to file a charge because of the fortuitous circumstance that the state where the claim arose is a deferral state, when another individual in a non-deferral state will have only 180 days in which to file. The purpose underlying the extended period in a deferral state is to give the state agency an initial opportunity to process the claim without jeopardizing the federal right, not to extend by 120 days the time for assertion of this federal right.
>
> ...
>
> "The extended filing period was not intended as a bonus for complainants residing in a deferral state but as a means of effecting an

> accommodation between the federal right and the requirement of pre-amendment § [706(b)] of initial resort to an available state or local agency.
>
> "We are here concerned with amended Title VII. However, except for an enlargement of time for filing a charge from 90 to 180 days and concomitant extension of the deferral provision to 300 days, there were no substantive changes made in § [706(d)] (renumbered § [706(e)]).
>
> "Thus a charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferral state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal Act."
>
> (Footnote omitted.)

The Seventh Circuit, in an opinion written by then-Judge Stevens, and closely tracked by the district court in the instant case (although specifically rejected by the majority in the Second Circuit decision below), has held that a charge originally submitted to the EEOC and referred to a 706 Agency need not be resubmitted, but may be held by the EEOC in "suspended animation" for the duration of the deferral period to be automatically "filed" with the EEOC after the expiration of that period. *Moore, supra,* 459 F.2d at 826. The *Moore* court specifically rejected the *Vigil* rationale. First, the Seventh Circuit rejected *Vigil's* holding that the EEOC could treat the charge as "filed" when received for § 706(e) purposes, but could defer processing the charge until the State 706 Agency had the opportunity to act required by § 706(c). *Moore* reasoned this holding in *Vigil* was inconsistent with the language and structure of Title VII as a whole, the

legislative history, and the Supreme Court's decision in *Love v. Pullman,* 404 U.S. 522 (1972). Next, *Moore* rejected *Vigil's* rationale that the submission of a charge to the EEOC "tolled" the extended limitations period, holding:

> "In our view the statute provides a basic limitations period of 90 [now 180] days, which may be extended (or 'tolled') to a maximum of 210 [now 300] days. We do not think that Congress intended a further extension (or a second 'tolling') to achieve the same purpose (time for state consideration) as the original enlargement of the 90-day period to 210 days in those states which have a Fair Employment Practices Agency. If Congress had so intended, we believe it would have included such a provision instead of the 210-day limitation. Moreover, the difficult questions of statutory construction will seldom arise if the complainant's original filing is within the basic 90-day period. Although we may share the EEOC's view that less diligence should have been required, we must respect the legislature's choice of the appropriate period of limitations, whether that choice was made to effectuate the policies of the Act or as an element of a compromise that enabled it to pass."
>
> (*Moore, supra,* 459 F.2d at 429-30.)

There are, thus, three separate views of the requirements of §§ 706(c) and (e) that have received specific judicial sanction from Courts of Appeals. *First,* there is the view espoused by the Eighth Circuit in *Olson*, that, to be timely, a charge must be "filed" either with the EEOC or with a State or local 706 Agency within 180 days of the alleged unlawful employment practice. *Second,* there is the view adopted by the Seventh Circuit in *Moore,* the district court below, and Judge Meskill in dissent from the Second Circuit opinion below, that the requirements of §§ 706(c) and (e) must be read literally, and that there is

but one "filing" date. Section 706(e) provides that, in a deferral state, a charge *may not be* "filed" with the EEOC until after the expiration of the mandatory deferral period, while at the same time § 706(c) requires that the charge in such a case *must be* "filed" within 300 days of the alleged unlawful discriminatory practice. *Finally,* the Second Circuit (in the case below), and the Tenth *(Vigil, supra),* Sixth *(Anderson, supra),* and, at one time, Eighth *(Richard, supra)* Circuits have held that if, in a deferral state, a charge is received by the EEOC within 300 days of the alleged unlawful employment practice, that charge is timely irrespective of whether State or local 706 Agency proceedings are instituted within that 300 day period.

This judicial confusion as to the proper interpretation of §§ 706(c) and (e) is also reflected in many opinions from Courts of Appeals considering related matters. For example, in *Doski v. M. Goldseker,* 539 F.2d 1326 (4th Cir. 1976), the Fourth Circuit considered a case involving a plaintiff who first instituted timely state proceedings 281 days after the alleged unlawful discriminatory act. The plaintiff in that case submitted a charge to the EEOC on the same day, and 284 days after the alleged discrimination the EEOC was notifed the State 706 Agency had terminated its proceedings. The court in *Doski,* in holding the charge to have been timely filed, specifically declined to follow *Olson,* saying:

> "On its face [§ 706(e)] requires only that proceedings be 'initially instituted' with the State or local agency. While it clearly states that unless this procedure is followed charges must be filed within 180 days with the EEOC, it does not on its face require or in any way intimate that charges with the State or local agency must be initially instituted *within 180 days."*
>
> *(Doski, supra,* 539 F.2d at 1329-30. Emphasis in original.)

The Ninth Circuit, in *Davis v. Valley Distributing Company,* 522 F.2d 827 (9th Cir. 1975), *cert. denied,* 429 U.S. 1090 (1977), in deciding whether the plaintiff's

submission to the EEOC was a timely "filing", and without citing *Moore,* said:

> "We conclude, therefore, that the applicable period for an initial filing with EEOC was 180 days ... and appellant's complaint was timely filed on the date when it was returned to EEOC's [sic] by the Arizona Commission and formally 'filed.' ... "
>
> (*Davis, supra,* 522 F.2d at 832.)

Finally, it is interesting to note that the Second Circuit itself, in *Weise v. Syracuse University,* 522 F.2d 397, 411 (2d Cir. 1975) has stated, in *dictum:*

> "If the alleged unlawful employment practice occurs within a state or locality having a law prohibiting such a practice, an aggrieved person cannot file a charge with the EEOC until 60 days have elapsed after the commencement of such state or local proceedings.... Resort to the EEOC *thereafter* is conditioned on the filing of charges not more than 300 days after the occurrence of the alleged unlawful practice or 30 days after the termination of state or local proceedings, whichever is earlier."
>
> (Footnote and citation omitted.)

It is apparent that confusion concerning the proper interpretation of § § 706(c) and (e) is rampant, and no clear trend in judicial thought is emerging. In fact, in considering a Title VII timeliness question similar to that presented by this case, one judge recently concluded:

> "The problem presented by this case has confused and bedeviled the courts for a number of years and promises to do so until either Congress or the Supreme Court speaks."
>
> (*Wiltshire v. Standard Oil Co. of California,* 447 F. Supp. 756 (N.D. Cal. 1978).)

This case presents this Court with an opportunity to end this confusion and to once and for all "set the record straight" as to the proper interpretation of § § 706(c) and (e).

B. The Decision of the Second Circuit Court of Appeals Is Contrary to the Prior Decisions of This Court.

The starting point for the analysis of the relevant decisions of this Court is *Love, supra.* In *Love,* the plaintiff submitted a "letter of inquiry" complaining of alleged discrimination to the EEOC prior to instituting State 706 Agency proceedings. The EEOC treated this letter as a complaint, but pursuant to the prohibition contained in § 706(c) [then § 706(b)], the EEOC *did not formally file the charge at that time.* Instead, the EEOC orally notified the State 706 Agency that it had received a complaint from the plaintiff. By letter to the EEOC, the State 706 Agency waived the opportunity to process the plaintiff's charge. The EEOC then investigated the complaint and issued a finding of reasonable cause, but was unable to obtain the defendant's voluntary compliance. This Court gave express approval to the procedure the EEOC followed in that case, saying:

> "We hold that the filing procedure followed here fully complied with the intent of the Act, and we thus reverse the judgment of the Court of Appeals. Nothing in the Act suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself, nor is there any requirement that the complaint to the state agency be made in writing rather than by oral referral. Further, we cannot agree with the respondent's claim that the EEOC may not properly hold a complaint in 'suspended animation,' automatically *filing it upon termination of the state proceedings."*
>
> *(Love, supra,* 404 U.S. 525-26. Emphasis added and footnotes omitted.)

It is important to note *Love* did not hold the EEOC could treat the plaintiff's charge as "filed" on receipt for § 706(e) purposes, but instead implicitly rejected such treatment. The defendant in *Love* argued that the EEOC's holding the plaintiff's charge in abeyance pending State agency proceedings was a nullity because the EEOC was required to view charges as being filed with the EEOC when they were received. In rejecting that contention, this court held:

> ". . . the statutory prohibition of 706(b) [now §706(c)] against filing charges that have not been referred to a state or local authority necessarily creates an exception to the regulation requiring filing on receipt."
>
> (*Love, supra,* 404 U.S. at 526, note 5.)

This Court's rejection of the concept that a charge is "filed" by the EEOC on receipt was expressly recognized by *Moore, supra,* 459 F.2d at 824, *Anderson, supra,* 464 F.2d at 725, *Richard, supra,* 469 F.2d at 1251, and the district court below (A16 - A17). Notwithstanding these authorities, the Second Circuit below held:

> "In our view, the clear import of *Love* is that a charge held, like Silver's, in 'suspended animation,' is 'filed' under § 706(e) when the EEOC *first* receives it, and not when the sixty-day period ends. As the *Love* Court noted, to construe the statute to require a second 'filing' after the state proceedings had concluded would create an additional procedural obstacle without advancing the purposes of the statute. 404 U.S. at 526-27. We therefore hold that Silver's charge was 'filed' under § 706(e) on June 15, 1976, 291 days after he was discharged and well within the 300-day limit. In sum, we believe the requirement in § 706(c) that no charge be 'filed' before the deferral period ends simply means that the EEOC may not process a Title VII complaint until sixty days after it has been deferred to a state agency."
>
> (A30 - A31; footnotes omitted.)

In a footnote, the court explained:

> "Although there is language in *Love* that can be construed as suggesting that a charge is 'filed' after the sixty-day period ends, *see, e.g.,* 404 U.S. at 526 & n.5; *Moore, supra,* 459 F.2d at 824, this reading is contradicted both by the passage cited in text and by the 'clear import' of the Court's analysis. *Vigil v. American Telephone & Telegraph Co.,* 455 F.2d 1222, 1224 (10th Cir. 1972)."
>
> (A31, n.13)

It appears that the Second Circuit below, which ignores the clear and unambiguous wording of the statute, also prefers the "clear import" of a Supreme Court decision to the actual language of that decision.

Another decision of this Court important to the resolution of this case is *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976). In *Electrical Workers,* a Title VII plaintiff contended that the limitations period of § 706(d) [now § 706(e)] had been tolled by his initiation of a grievance proceeding pursuant to a collective bargaining agreement. In rejecting that contention, this Court stated that:

> ". . . Congress has already spoken with respect to what it considers acceptable delay when it established a 90- [now 180-] day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. *In defining Title VII's jurisdictional prerequisites 'with precision,'* [citations omitted], *Congress did not leave to courts the decision as to which delays might or might not be 'slight'."*
>
> *(Electrical Workers, supra,* 429 U.S. at 240. Emphasis added.)

In commenting upon the extended limitations period of § 706(d) [now § 706(e)] where a claim of discrimination is commenced before a State or local agency, this

Court stated that :

> "Where Congress has spoken with respect to a claim much more closely related to the Title VII claim than is the contractual claim pursued under the grievance procedure, *and then firmly limited the maximum possible extension of the limitations period applicable thereto,* we think that all of petitioner's arguments taken together simply do not carry sufficient weight to overcome the negative implications from the language used by Congress [citation omitted]."
>
> *(Electrical Workers, supra,* 429 U.S. at 240. Emphasis added.)

Thus, this Court has severly limited the application of the "tolling" rationale, which was essential to the *Anderson* and *Richard* decisions and which was one of the alternative bases for the *Vigil* decision, and has strongly suggested that rationale is inapplicable to the facts presented in this case. However, the court below avoided this issue by stating:

> "We do not reach the question, decided affirmatively by [the Sixth, Eighth and Tenth] circuits, whether initial receipt of the charge by the EEOC 'tolls' the § 706(e) statute of limitations. Rather, we interpret § 706(c) in a manner consistent with the result reached in *Vigil, Anderson,* and *Richard.* Moreover, we note that the Tenth Circuit employed our statutory construction as an alternative ground in *Vigil, supra,* 455 F.2d at 1224."

Finally of interest is *Oscar Mayer & Co. v. Evans,* ___ U.S. ___, 60 L.Ed.2d 609 (1979). *Oscar Mayer* dealt with the timeliness of a charge filed under the Age Discrimination in Employment Act of 1967 ["ADEA"], and held:

> ". . . that § 14(b) [of the ADEA] mandates that a grievant not bring a suit in federal court under § 7(c) of the ADEA until he has first resorted to appropriate state administrative proceedings. We also hold, however, that the grievant is not required to commence the state proceedings within time limits specified by state law."
>
> *(Oscar Mayer, supra;* ___ U.S. at ___, 60 L. Ed. 2d at 614.)

The court below considered *Oscar Mayer* as supportive of its conclusion Silver's charge was timely filed with the EEOC. And, while it is true that ADEA § 14(b) is patterned after and is virtually *in haec verba* with Title VII § 706(c), the ADEA differs from Title VII in one important way not considered by the court below: the ADEA has no provision analagous to the one contained in Title VII § 706(e) that the extended 300 day filing period is available *only* to an aggrieved person who has *initially instituted* state proceedings. It is correct that *Oscar Mayer* would support the position that the EEOC's mailing of a discrimination charge to a State 706 Agency "commences" state proceedings for § 706(c) deferral purposes *(see Oscar Mayer, supra,* ____ U.S. at ___, 60 L.Ed.2d at 618-19). However, assuming, *arguendo,* that the Second Circuit was correct in holding that "filing" means one thing in § 706(c) and another in § 706(e) and that the charge was "filed" with the EEOC when received for § 706(e) purposes, then Silver "initially instituted" *federal proceedings* rather than state proceedings and is entitled only to the 180-day filing period rather than the 300-day period.

C. The Decision of the Second Circuit Court of Appeals Is Contrary to the Plain Language of Section 706(c) of Title VII.

The court below admittedly eschewed the literal meaning of Section 706(c) in favor of what it viewed to be the "fundamental policies embodied in Title VII". (A28 - A29). As recognized by the *Moore* court and Judge Meskill in dissent below, the meaning of these two sections is clear and unambiguous. Judge Meskill dissenting from the decision below, explained it thus:

"Despite the much-emphasized complexity of Title VII, there is no dispute over the literal meaning of the two statutory provisions under examination. Section 706(c), the deferral provision, provides that in a state that has created an agency to hear employment discrimination claims (a 'deferral state'), no charge may be filed with the EEOC until 60 days or 120 days (depending on how long the state agency has been in existence) after state proceedings have been commenced, unless such state proceedings have been earlier terminated. Section 706(e), the limitations provision, provides that charges must be filed with the EEOC within 180 days of the alleged unlawful employment practice, except that where an aggrieved party has *initially instituted* state proceedings, a charge must be filed with the EEOC within 300 days of the alleged unlawful practice. [Emphasis added.]

"The purposes behind these provisions are every bit as clear as their literal meanings. In *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972), a unanimous Supreme Court explicitly stated that the purpose of Title VII's deferral provision is 'to give state agencies a prior opportunity to consider discrimination complaints' while the purpose of the limitations provision is 'to ensure expedition in the filing and handling of those complaints.' Not surprisingly, the scheme enacted by Congress effectuates these two different goals by imposing two different requirements on those who seek to invoke the remedial provisions of Title VII. Thus, a charge *must not* be filed with the EEOC until after the expiration of the mandatory deferral period (or termination of state proceedings), yet a charge *must* be filed with the EEOC within 300 days of an alleged unlawful employment practice. As a practical matter, a person who complains to the EEOC within 180 days of an alleged illegal employment practice can be sure of neither tripping on the deferral threshold nor bumping against the limitations ceiling. Regardless of whether the relevant state has created an

agency to which deferral is necessary, and regardless of how long any such agency has been in existence, and regardless of how quickly any such deferral agency terminates its proceedings, the complaint will be timely."

(A38 - A39)

The *Moore* court reached the same conclusion for the same reason -- it is what the statute provides. *Moore, supra,* 459 F.2d at 821-22.

The majority of the court below, however, preferred the "purpose" of Title VII to its language, saying:

"Confronted with [the provisions of §§ 706 (c) and (e)], the able district court judge read § 706(c) literally. He reasoned that even when a charge is received by the EEOC well within 300 days of the alleged discrimination, it cannot be considered 'filed' with that office until sixty days after referral to the state agency. Thus, according to Judge Foley, Silver's charge, albeit received by the EEOC 291 days after his discharge, was not 'filed' before August 14, 1976, 352 days subsequent to the termination of his employment. Accordingly, Judge Foley determined that Silver was barred by the 300-day jurisdictional prerequisite of § 706(e).

"The district court decision would, therefore, require a Title VII complainant to file his charge with the state agency within 240 days of discharge or forfeit the opportunity to bring his complaint before the EEOC. We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is 'filed' for purposes of § 706(e) when received, and 'filed' as required by § 706(c) when the state deferral period ends."

(A28 - A29; footnote omitted.)

It is respectfully submitted that where Congress has spoken in clear and unambiguous terms, and the legislative history does not provide firm evidence the statute cannot mean what it so clearly seems to say *(cf. Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 361 (1977)), then it is not the place of the judiciary to substitute its judgment for that of Congress as to what the words in question mean, and that the Second Circuit below erred in doing just that.

It is thus clear that the Second Circuit erred in holding that a charge is "filed" for § 706(e) purposes upon receipt by the EEOC, but "filed" for § 706(c) purposes upon the expiration of the deferral period. Further, the Second Circuit also erred in holding Silver's charge to have been timely filed even though State 706 Agency proceedings were not "initially instituted", and the § 706(c) deferral period did not end, until well after the extended 300 day limitations period provided for by § 706(e). These holdings are contrary to the plain language of the statute, as the Second Circuit itself conceded, and are not supported by the legislative history or prior decisions of this Court.

II. The "Blacklisting" Issue.

A. The Decision of the Second Circuit Court of Appeals is Contrary to Prior Decisions of Other Circuit Courts of Appeals.

Although this Court has never specifically considered whether Title VII encompasses post-employment discrimination, the Circuit Courts of Appeals which have addressed this issue all agree that the scope of Title VII is sufficiently broad to provide a remedy for post-employment discrimination. *See Pantchenko v. C. B. Dolge Company,* 581 F.2d 1052 (2d Cir. 1978) (bad references by former employer cognizable as "employment discrimination"); *Shehadeh v. Chesapeake and Potomac Telephone Co.,* 595 F.2d 711 (D.C. Cir. 1978) (untrue and damaging references by former employer cognizable as "employment discrimination"); *Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir. 1977) (bad references by former employer cognizable as "retaliation" for filing charge with EEOC).

The Courts of Appeals are also generally in agreement that the proper scope of a Title VII charge is limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination. *See e.g., Tipler v. E. I. duPont de Nemours & Co.,* 443 F.2d 125 (6th Cir. 1971); *Oubichon v. North American Rockwell Corp.,* 482 F.2d 569 (9th Cir. 1973); *Jenkins v. Blue Cross Mutual Hospital Ins., Inc.,* 538 F.2d 164 (7th Cir. 1976) *(en banc), cert. denied,* 429 U.S. 986 (1976); *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970). This rule is regarded as serving two purposes: (1) it permits the effective functioning of Title VII where the persons filing charges are not trained legal technicians; and (2) subsequent civil litigation is more intimately related to the EEOC investigation than to the words of the charge that triggered the investigation. *See EEOC v. Bailey Co., Inc.,* 563 F.2d 439 (6th Cir. 1977), *cert. denied,* 435 U.S. 915 (1978). At least one Circuit, however, has attempted to further Title VII's goal of voluntary compliance, and to protect the rights of the party accused of discriminatory conduct, by limiting the scope of subsequent judicial proceedings to the scope of any discrimination contained in the charge or developed in the course of a reasonable EEOC investigation, provided such discrimination was included in the EEOC's reasonable cause determination and was followed by compliance with Title VII's conciliation procedures. *EEOC v. General Electric Co.,* 532 F.2d 359, 366 (4th Cir. 1976). *Accord EEOC v. Greyhound Lines,* 411 F. Supp. 97, 100-102 (W.D. Pa. 1976); *EEOC v. East Hills Ford Sales, Inc.,* 445 F. Supp. 985, 987 (W.D. Pa. 1978).

It should be noted that in this case there was no independent EEOC investigation at all, and no reference in the EEOC's reasonable cause determination to Silver's "blacklisting" allegations.

The Second Circuit below, reversing the lower court, held that the district court had jurisdiction to consider Silver's claims of "blacklisting" and bad references on the basis they were within the scope of a reasonable EEOC investigation. (A35 - A36; A37 - A38). This holding appears to ignore the undisputed facts that the EEOC never conducted any investigation of, nor attempted to conciliate, any aspect of Silver's charge. Mohasco never received *any* notice that Silver had attempted to place

allegations of "blacklisting" before the EEOC, and the EEOC's determination that there was no reasonable cause to believe Silver's charges to be true did not refer to blacklisting and, in fact, referred only to the Human Rights Division's finding of no probable cause which in turn dealt solely with Silver's allegations of discriminatory discharge.

The Second Circuit's decision that Silver may maintain his action against Mohasco with respect to his allegations of post-employment discrimination contrasts sharply with several cases where a court has not permitted a charging party to assert in his judicial complaint a different basis for alleged discriminatory conduct than that asserted before the EEOC. *See EEOC v. Bailey Co., Inc., supra,* 563 F.2d at 448-450 (allegations of religious discrimination not within scope of reasonable EEOC investigation of sex discrimination charge); *EEOC v. New York Times Broadcasting Service, Inc.,* 364 F. Supp. 651, 653-54 (W.D. Pa. 1973) (allegations of racial discrimination not within scope of reasonable EEOC investigation into sex discrimination charge); *Fix v. Swinerton and Walberg Co.,* 320 F. Supp. 58, 59 (D. Colo. 1970) (allegations of religious discrimination stricken where only allegations of national origin were disclosed to EEOC); *McCraz v. Standard Oil Co. (Indiana),* 76 F.R.D. 490, 497-98 (N.D. Ill. 1977) (allegations of discrimination on basis of sex, national origin or other unspecified and forbidden criteria stricken as not within scope of reasonable EEOC investigation of race discrimination charge). *But see Sanchez v. Standard Brands, supra* (allegations of national origin made in amended charge related back to original charge of sex discrimination). In this case, Silver is not merely asserting a new motivation as the basis for allegedly unlawful discriminatory conduct, but is asserting a wholly different type of discrimination than anything Mohasco ever received notice of or the EEOC considered in its no reasonable cause determination.

As the District of Columbia Circuit in *Shehadeh, supra,* concluded, allegations of disparaging references are new and independent acts of discrimination, distinct from an allegation of discriminatory discharge. In *Shehadeh, supra,* the District of Columbia Circuit considered a Title VII action alleging "blacklisting" where the aggrieved party had filed several EEOC charges, four of them specifically stating the defendant had given her a bad reference. In considering whether these bad references were merely a "natural outgrowth" of the original termination, the Court said:

> "Appellant alleged that pejorative references were distributed deliberately and for invidious reasons. Her charges reflect a conviction that certain critically-situated personnel at C&P of Maryland harbor an ongoing discriminatory animus toward her. And the record, though sparse at this juncture, evinces her attempt to establish that such personnel communicated with prospective employers. If, as appellant avers, *untrue* and damaging accounts of her employment qualifications were purposefully circulated in consequence of her gender or her husband's ancestry, they were new and independent acts of discrimination, and the 'natural outgrowth' of her dismissal would have been appreciably surpassed. Though the discharge and the disparaging references assertedly may have been prompted by the same discriminatory state of mind, that would not reduce the references to mere effects of the firing."
>
> *(Shehadeh, supra,* 595 F.2d at 719-20. Emphasis in the original; footnotes omitted.)

The Second Circuit below also implicitly rejected, without citation, *Ferguson v. Mobil Oil Corp.,* 443 F. Supp. 1334 (S.D. N.Y. 1978). There, the plaintiff alleged in his Title VII civil action that, following his discharge by Mobil, he was discharged from subsequent employment and rejected by a potential employer as the result of information supplied by Mobil. As in this case, the plaintiff alleged that such acts resulted in his continuing unemployment. The district court granted the defendant's motion to dismiss the plaintiff's blacklisting allegation on the ground that it was not included in the charge the plaintiff had filed with the EEOC.

> ". . . It is clear that this Court can take cognizance of averments of discrimination which are 'like or reasonably related to the allegations of

> the charge [submitted to the EEOC] and growing out of such allegations,' [citations omitted]. However, the 'blacklisting' claim at issue here cannot be so construed. This claim was never the subject of any discussion or investigation by the EEOC or the parties before it, demonstrating no notice thereof to the defendant and no reasonable relation to the charges investigated. . . ."
>
> (*Ferguson, supra,* 443 F. Supp. at 1337.)

Furthermore, in rejecting the plaintiff's contention that the blacklisting allegation "reasonably grew out of the fact that he was a victim of disparate treatment by Mobil" during his employment, the Southern District viewed the plaintiff's alleged discriminatory discharge from employment as fundamentally different from the alleged "blacklisting":

> ". . . The 'blacklisting' averment involves only that period *after* said employment when the employer/employee status, and its concomitant rights and duties, had expired and an entirely different legal context had arisen. Not only do the two periods involve distinct factual theatres, but also distinct legal obligations only the earlier of which was before the EEOC. . . ."
>
> (*Ferguson, supra,* 443 F. Supp. at 1337-38. Emphasis in the original.)

Traditionally, the courts have interpreted Title VII's procedural mandates with extreme liberality. *See* e.*g., Egelston v. State University College at Geneseo,* 535 F.2d 752 (2d Cir. 1976); *Weise v. Syracuse University, supra; Sanchez v. Standard Brands, Inc., supra.* Nonetheless, these procedures do embody Congress' judgment as to the due process requirements appropriate for such administrative proceedings. As stated by the Sixth Circuit in *EEOC v. Bailey Co., Inc., supra,* 563 F.2d at 450, a case dealing with the proper scope of the judicial complaint in an EEOC-initiated lawsuit:

> "Finally, we believe that our position in the present case is supported by the concern expressed in Congress that due process safeguards be built into the statutory scheme of Title VII. Remarks of Congressman Quie, House Debate on H.R. 1746, 92d Cong., 1st Sess., 117 Cong.Rec. 31962 (Sept. 15, 1971); S.Rep.No. 92-415, 92nd Cong., 1st Sess. 25 (1971). Although neither the statutory language nor the legislative history directly address the question before us, it is clear that the requirement in § 703 of Title VII, 42 U.S.C. § 2000e-2, of timely notice to an employer of a charge filed with the EEOC alleging employment discrimination embodies due process guaranties. *New Orleans Public Service, Inc. v. Brown,* 369 F.Supp. 702, 710 (E.D.La.1974). If an EEOC investigation of an employer uncovers possible unlawful discrimination of a kind not raised by the charging party and not affecting that party, then the employer should be given notice if the EEOC intends to hold the employer accountable before the EEOC and in court.
>
> "We are unable to accept the EEOC's argument that it was immaterial that appellee received notice and opportunity to comment at the time the EEOC issued its reasonable cause determination and during conciliation rather than before the issuance of the reasonable cause determination. While a court might conclude that the Due Process Clause of the Fifth Amendment was not violated by the procedure followed by the EEOC in the present case, our concern is with the legislative judgment of due process incorporated into the specific statutory scheme of Title VII. Evidence of that legislative intent indicates a concern for fair treatment of employers."

Where, as here, a complainant has merely forwarded a copy of a letter to the EEOC without any indication that it is to be viewed as a new charge or an amendment to a prior charge *(cf. Moore, supra,* 459 F.2d at 822), the

EEOC does not treat such letter as a new charge or as an amendment to a previous charge, or otherwise give notice of its existence to the respondent, and the EEOC does not investigate, attempt to conciliate, or include in its no reasonable cause determination the substance of such letter, then permitting the complainant to pursue the claims contained in such letter would violate traditional notions of due process and fair play.

B. The Decision of the Second Circuit Court of Appeals is Contrary to Prior Decisions of This Court.

This Court has had occasion to address the notice requirements of Title VII § 706(b). In *Occidental Life Insurance Co. v. EEOC, supra,* this Court considered what time limitation, if any, is imposed on the EEOC's power to bring suit against a private employer. After holding the only statute of limitations was directed to the period preceding the filing of an initial charge, the court said:

> "The absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice than can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> "Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made, 29 CFR § 1601.19b(b)(1976),

> and when the EEOC has terminated its efforts to conciliate a dispute, § § 1601.23, 1601.25."
>
> *(Occidental Life, supra,* 432 U.S. at 372-73, footnote omitted.)

In this case, Mohasco never received notice of Silver's blacklisting claims from the EEOC. The EEOC never notified Mohasco that Silver had filed a new charge or amended his charge, and the "no reasonable cause" determination did not make any reference to allegations of post-employment discrimination. In fact, Mohasco did not learn that Silver had mailed to the EEOC a copy of his August 31, 1976 letter to the Human Rights Division until Mohasco obtained a copy of the EEOC's file in December, 1977, long after the Human Rights Division and EEOC proceedings were concluded, and after this action was commenced.

Further, Silver's letter did not definitely allege blacklisting charges but merely suggested such practices might have taken place and suggested that the Human Rights Division investigate them. Apparently, the EEOC did not consider its copy of that letter to be a charge and therefore did not institute an investigation into, or notify Mohasco of, the allegations contained in it.

Thus, it is submitted, the Second Circuit's decision that Silver can nonetheless litigate his claims of post-employment discrimination raises substantial questions which should be considered by this Court.

CONCLUSION

For all of the foregoing reasons, we respectfully request that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RALPH H. SILVER,
Plaintiff,

-against- **77-CV-472**

MOHASCO CORPORATION;
EDWARD CURREN;
RAYMOND GREENHILL;
FREDERICK WOLLER;
HERBERT BROWN;
AND JAMES CULLEN
Defendants.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION and ORDER

This is a private "complaint" suit instituted pursuant to the Civil Rights Act of 1964, Title VII, § § 701 *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § § 2000e *et seq.*, alleging employment discrimination on the basis of religion. *See* 42 U.S.C. § 2000e-2. Plaintiff Ralph H. Silver was employed by defendant Mohasco Corporation, a New York corporation with offices in Amsterdam, New York, on July 15, 1974, in the capacity of Senior Marketing Economist. It is alleged that during his employment, plaintiff was mentally abused, deceived, pressured, and coerced by defendant Mohasco Corporation as well as by defendants Edward Curren, Raymond Greenhill, Frederick Woller, Herbert Brown, and James Cullen, individually and in their capacities as officials and employees of Mohasco Corporation, in an attempt to force plaintiff to resign because he was of the Jewish religion.

Plaintiff alleges that the individual defendants conspired with each other on behalf of defendant Mohasco Corporation to organize and implement a purposeful plan of discrimination and harassment, referred to as the "Woller Plan" in plaintiff's complaint, to be directed against persons of minority groups and religions. More specifically, plaintiff alleges that these defendants conspired to employ members of minority groups and religions as token employees in an attempt to defraud and mislead governmental agencies, the public, and the shareholders of defendant Mohasco Corporation by making it appear that Mohasco Corporation was an equal opportunity employer. It is alleged that this plan

called for the hiring of token employees -- to be followed by harassment to force their resignation. Thus, plaintiff asserts that he was both hired and fired solely because of his religious beliefs.

Plaintiff further alleges that despite the continuing harassment by the defendants he refused to resign. On August 29, 1975, plaintiff was discharged by defendant Mohasco Corporation. Plaintiff asserts that his discharge was without warning, in spite of his efforts to perform satisfactorily, and on account of his religious beliefs. In addition, plaintiff alleges that since his termination of employment with defendant Mohasco Corporation the defendants have made false, derogatory, and malicious accusations to prospective employers of the plaintiff when asked for a reference, thereby causing plaintiff to remain unemployed.

On June 15, 1976, the Equal Employment Opportunity Commission ("EEOC") received a letter written by the plaintiff asserting a charge of discrimination. *See* 29 C.F.R. § 1601.11(b) (1977). This letter was forwarded to the New York State Division of Human Rights, which on February 9, 1977, found that there was no probable cause to believe that Mohasco Corporation had engaged in an unlawful discriminatory practice with respect to the plaintiff. Subsequent to its deferral to the Division of Human Rights, the EEOC began processing plaintiff's charge of discrimination. On August 24, 1977, the EEOC ended its investigation with a finding that there was no reasonable cause to believe that plaintiff had been discriminated against and issued a notice of right to sue. Thereafter, on November 23, 1977, plaintiff commenced this lawsuit.

Plaintiff seeks an injunction against the continuing unlawful employment practices of the defendants, compensatory damages against all defendants, jointly and severally, in the sum of $100,000.00, punitive damages against defendant Mohasco Corporation in the sum of $1,000,000.00 and each individual defendant in the sum of $100,000.00, and such other and further relief as the Court deems just and equitable. *See, e.g., Curtis v. Loether,* 415 U.S. 189, 196-97 (1974); *Pearson v. Western Electric Co.,* 542 F.2d 1150, 1151-52 (10th Cir. 1976).

It appears that plaintiff has also commenced an action in the courts of the State of New York for money damages in the millions against these same defendants. That action is apparently based on allegations of fraud, intentional infliction of emotional harm, libel, slander, invasion of privacy, and violation of plaintiff's civil rights. (Affidavit

of Warner M. Bouck, Exhibit 1, filed January 27, 1978).

Now before this Court is a motion to dismiss, Fed. R. Civ. P. 12(b), on behalf of the individual defendants Curren, Greenhill, Woller, Brown, and Cullen on the grounds of lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. Also before the Court is a separate motion on behalf of defendant Mohasco Corporation for summary judgment, Fed. R. Civ. P. 56, on the ground, *inter alia,* that this Court lacks jurisdiction over the subject matter because plaintiff failed to make a timely filing of his grievance with the EEOC as required under Title VII.

I

The basis of the individual defendants' motion to dismiss is plaintiff's failure to name them as respondents in his charge filed with the EEOC. It is axiomatic that a jurisdictional prerequisite to the commencement of a "complaint" suit under Title VII is the filing of a charge with the EEOC. This requirement not only puts the respondent named in the charge on notice of the alleged violation, but also permits the EEOC to go forward with attempts at conciliation or voluntary compliance before the filing of a judicial complaint. Defendants Curren, Greenhill, Woller, Brown, and Cullen contend that plaintiff's failure to name them as respondents in the proceeding before the EEOC deprives this Court of subject-matter jurisdiction over any claim asserted against them in this lawsuit.

It is clearly evident that plaintiff's verified complaint filed with the New York State Division of Human Rights named only Mohasco Corporation as a respondent. (Memorandum in Support of Motion to Dismiss the Complaint by Defendants Curren, Greenhill, Woller, Brown and Cullen, Exhibit C, filed January 27, 1978). Moreover, plaintiff's Title VII charge that was filed with the EEOC based on plaintiff's letter received by the EEOC on June 15, 1976, and correspondence relating thereto not only fail to mention defendants Brown and Cullen at all but characterize only Mohasco Corporation as a respondent. (*Id.*, Exhibits A, B, D, F(1) & F(2)).

Title VII clearly states that, in cases dealing with private sector employers, if the EEOC dismisses a charge or does not enter into a conciliation agreement with the respondent or does not file a civil action on behalf of the charging party within a certain time period, then the EEOC

shall notify the person aggrieved that

> a civil action may be brought *against the respondent named in the charge* . . . by the person claiming to be aggrieved . . .

within 90 days of the giving of such notice. 42 U.S.C. § 2000e-5(f)(1) (emphasis added). It is undisputed that the individual defendants named in this lawsuit were not sent notices by the EEOC with regard to plaintiff's charge of discrimination, *see* 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.13 (1977), and that plaintiff's right to sue letter named only Mohasco Corporation as a respondent, *see* 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.25 (1977). Furthermore, the record of the proceedings before the EEOC does not show that an investigation was conducted or that a determination was made by the EEOC with respect to the individual defendants named in this lawsuit.

It is important to note, however, that defendants Curren, Woller, and Greenhill are referred to in plaintiff's letter to the EEOC that alleged a violation of his Title VII rights. Nonetheless, in my opinion, the scant references to these individuals in plaintiff's letter can be read and viewed only as asserting that they acted in their corporate capacities on behalf of Mohasco Corporation and in pursuit of corporate objectives. This position is further supported by statements found in plaintiff's letter to the EEOC such as *"Mohasco* created the economist position to give token compliance with job anti-discrimination legislation." (Memorandum in Support of Motion to Dismiss the Complaint by Defendants Curren, Greenhill, Woller, Brown and Cullen, Exhibit A, filed January 27, 1978) (emphasis added).

Furthermore, in my judgment, a substantial identity does not exist between defendant Mohasco Corporation and the five individuals named as additional defendants in this civil action to warrant an exception to the general rule that only those parties named in the charge before the EEOC can be brought before a federal district court in a private "complaint" action. *See, e.g., Chastang v. Flynn & Emrich Co.*, 365 F. Supp. 957, 964 (D. Md. 1973), *aff'd*, 541 F.2d 1040 (4th Cir. 1976).

No determination or attempts at conciliation or voluntary compliance could have been made with respect to these individuals in plaintiff's proceeding before the EEOC solely because of plaintiff's failure to object to the

omission of these individuals as named respondents in his charge filed with the EEOC. *See Bryant v. Western Electric Co.*, 572 F.2d 1087 (5th Cir. 1978)(per curiam). Thus, in my judgment, plaintiff's claim against defendants Curren, Greenhill, Woller, Brown, and Cullen must be dismissed because plaintiff did not name these individuals as respondents in his EEOC charge and because plaintiff did not pursue administrative relief with respect to these individuals prior to the commencement of this civil action. *See. e.g., Love v. Pullman Co.*, 404 U.S. 522, 523 (1972); *Beverly v. Lone Star Lead Construction Corp.*, 437 F.2d 1136, 1139-40 (5th Cir. 1971); *Travers v. Corning Glass Works*, 76 F.R.D. 431, 432-33 (S.D.N.Y. 1977).

It is clear to my mind that the tenor of plaintiff's charge filed with the EEOC was directed solely against his corporate employer. Evidently, this also was the view of the EEOC. While recognizing the liberality with which a court must view the procedural requirements of Title VII in favor of a charging party, *e.g., Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105 (2d Cir. 1978); *Egelston v. State University College*, 535 F.2d 752, 754-55 (2d Cir. 1976); *Weise v. Syracuse University*, 522 F.2d 397, 411-12 (2d Cir. 1975), I do not believe that this "liberality" should be carried to its extreme at the expense of the rights of an individual alleged to have violated federal antidiscrimination laws. Such a policy, under the circumstances of this case, would, in my judgment, circumvent the statutory requirements of notice and opportunity to engage in meaningful conciliation efforts. A plaintiff, especially one such as the plaintiff in this lawsuit who has had two years of law school training and who had benefit of the advice of counsel at some point during the pendency of his charge before the EEOC, should not be given a blanket reprieve from failing to abide by important statutory jurisdictional requirements.

Viewing plaintiff's complaint in a light most favorable to his position, as I must at this stage of litigation, the conclusion is still inescapable that plaintiff's failure to name defendants Curren, Greenhill, Woller, Brown, and Cullen as respondents in his Title VII charge filed with the EEOC was not a mere technicality but a fatal flaw warranting dismissal of his claim as against these individual defendants in this lawsuit on the ground of lack of jurisdiction over the subject matter. *See, e.g., Sabala v. Western*

Gillette, Inc., 516 F.2d 1251, 1254 (5th Cir. 1975), *vacated & remanded on other grounds*, 431 U.S. 951 (1977); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969); *Stebbins v. Nationwide Mutual Insurance Co.*, 382 F.2d 267, 268 (4th Cir. 1967)(per curiam), *cert. denied*, 390 U.S. 910 (1968); *Plummer v. Chicago Journeyman Plumbers' Local 130*, 452 F. Supp. 1127, 1133-35 (N.D. Ill. 1978); *Travers v. Corning Glass Works, supra; Harris v. Commonwealth of Pennsylvania*, 419 F. Supp. 10, 13 (M.D. Pa. 1976); *Scott v. University of Delaware*, 385 F. Supp. 937, 941-42 (D. Del. 1974).

II

Defendant Mohasco Corporation moves for summary judgment and dismissal of plaintiff's complaint on the ground, among others, that this Court lacks jurisdiction over the subject matter because plaintiff failed to make a timely filing of his charge with the EEOC as required under Title VII. Thus, the procedural history of this case is, for present purposes, of primary importance and must be detailed.

Plaintiff's first act, with regard to his claim of discrimination, was the submission of a letter to the EEOC, which was received on June 15, 1976, 292 days after his discharge. In general, Title VII provides that if an alleged unlawful employment practice occurs in a state which has an agency that can grant relief from such a practice, a charging party is required to first file a complaint with such agency and can file a charge with the EEOC only after the passage of 60 days from the commencement of proceedings in the state agency or termination of such proceedings, whichever is earlier. Civil Rights Act of 1964, Title VII, § 706(c), *as amended*, 42 U.S.C. § 2000e-5(c). The New York State Division of Human Rights is such a so-called "706 agency" under regulations promulgated by the EEOC. 29 C.F.R. § 1601.12(m)(1977). Therefore, the EEOC immediately forwarded plaintiff's letter to the New York State Division of Human Rights together with a notice of deferral that stated:

> This charge is being deferred to your agency pursuant to Section 706(c) [42 U.S.C. § 2000e-5(c)] of Title VII of the Civil Rights Act of 1964, as amended. The Commission will automatically file this charge at the expiration of the deferral

> period, unless we are notified before the expiration of that period that your agency has terminated its proceedings.

(Motion for Summary Judgment, Exhibit B, filed February 14, 1978).

By letter dated June 18, 1976, the Division of Human Rights advised the plaintiff of its receipt of his letter to the EEOC and requested that he file a complaint with them within 30 days. On August 12, 1976, 55 days after transmittal of this letter by the Division of Human Rights, plaintiff filed a verified complaint with the Division of Human Rights charging that he had been discharged on August 29, 1975, by Mohasco Corporation on account of his religion. (Motion for Summary Judgment, Exhibit D, filed February 14, 1978). Thereafter, on August 20, 1976, 66 days after receiving plaintiff's letter charging an unlawful employment practice, the EEOC notified the president of Mohasco Corporation that plaintiff had filed a charge of employment discrimination against the corporation. *(Id.*, Exhibit F). *See* 29 C.F.R. § § 1601.13 (respondent to be served by EEOC with copy of charge within 10 days of filing) and 1601.12(b)(1) (iv) (60-day period of deferral commences upon EEOC mailing to "706 agency") (1977). It should be noted that the EEOC does not appear to have requested plaintiff to provide it with a formal and verified Title VII charge as required by regulation, *see* 29 C.F.R. § § 1601.8, 1601.11 (1977), but rather apparently treated plaintiff's letter received by the EEOC on June 15, 1976, or possibly plaintiff's verified complaint filed with the New York State Division of Human Rights on August 12, 1976, as constituting plaintiff's charge before the EEOC. *See generally Georgia Power Co. v. EEOC*, 412 F.2d 462, 466 (5th Cir. 1969).

Mohasco Corporation responded to the EEOC's notice by raising an objection to the assumption of jurisdiction by the EEOC. Defendant Mohasco Corporation argued that plaintiff failed to file a charge with the EEOC within any applicable limitations period prescribed by Title VII.

Thereafter, on February 9, 1977, the New York State Division of Human Rights issued its determination that "[i] t cannot be ascertained that complainant's employment was terminated for reasons other than management's

judgment that his job performance was unsatisfactory" and found that there was no probable cause to believe that Mohasco Corporation had engaged in the unlawful discriminatory practice complained of by the plaintiff. (Motion for Summary Judgment, Exhibit H, filed February 14, 1978). This determination was upheld by the New York State Human Rights Appeal Board on December 22, 1977. (*Id.*, Exhibit I).

The EEOC issued its determination and provided plaintiff with a notice of right to sue on August 24, 1977. The determination by the EEOC states:

> Respondent [Mohasco Corporation] is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. . . .[However,] there is not reasonable cause to believe the charge is true.

(Motion for Summary Judgment, Exhibit J, filed February 14, 1978). Plaintiff commenced the present lawsuit on November 23, 1977, 91 days after transmittal of this determination and notice of right to sue by the EEOC.

In providing for "complaint" suits under Title VII, Congress evinced a preference for administrative conciliation over litigation. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Consequently, the EEOC can bring a civil "complaint" action against a private sector employer only after the "informal methods of conference, conciliation, and persuasion" have failed. 42 U.S.C. § 2000e-5 (b). *See also* 42 U.S.C. § 2000e-5(f)(1). Likewise, before a private "complaint" action can be brought to vindicate an alleged violation of Title VII rights, the EEOC, and in many cases a "706 agency" as well, must have had an opportunity to investigate and rule on the merits of the charging party's claim. Aside from complying with the appropriate deferral period mandated by Title VII, if applicable, a person claiming to be aggrieved cannot commence a private "complaint" action against a private sector employer until the EEOC has dismissed the charge *or* if within the passage of 180 days from the filing of the charge or within the 60-day deferral period, whichever is later, the EEOC has not entered into a conciliation agreement or filed a civil action with regard to the charge, after which time the EEOC is

required to notify the charging party that a private civil action may now be commenced. 42 U.S.C. § 2000e-5 (f) (1).

In addition to following the above-mentioned procedures, a private litigant must also abide by the statutory time requirements prescribed by Title VII for the filing of an unlawful employment practice charge with the EEOC. Pursuant to Title VII:

> A charge . . . shall be filed within one hundred and eighty [180] days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a [706 agency] . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred [300] days after the alleged unlawful employment practice occurred, or within thirty [30] days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . .

42 U.S.C. § 2000e-5(e). In Title VII, however, Congress also provided that:

> In the case of an alleged unlawful employment practice occuring in a State, or political subdivision of a State, [having a 706 agency] . . . *no charge may be filed*. . .by the person aggrieved before the expiration of sixty [60] days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated. . . .

42 U.S.C. § 2000e-5(c) (emphasis added).

It is undisputed that on June 15, 1976, the day on which the EEOC received plaintiff's letter alleging a charge of employment discrimination, plaintiff had not commenced a proceeding before the New York State Division of Human Rights. Therefore, under § 2000e-5(c), which is applicable under the circumstances of this case along with § 2000e-5(e)'s extended time period for filing, it

would appear to be clear that plaintiff's charge could not have been immediately filed but must have been in "suspended animation" status until 60 days after a proceeding was commenced before the Division of Human Rights, *but see* 29 C.F.R. § 1601.12(b)(1)(iv) (60-day deferral period commences upon EEOC mailing to "706 agency") (1977), at which time plaintiff's charge would have been automatically filed by the EEOC. *See Love v. Pullman Co., supra,* 404 U.S. at 526. Although the EEOC appears to have treated its deferral to the Division of Human Rights as *commencing* proceedings before that "706 agency" in accordance with § 2000e-5(c), *see* Motion for Summary Judgment, Exhibit F, filed February 14, 1978; 29 C.F.R. § 1601.13 (respondent to be served by EEOC with copy of charge within 10 days of filing) (1977), in my judgment, plaintiff's proceeding before the New York State Division of Human Rights was not commenced until August 12, 1976, when plaintiff filed a verified complaint with that agency. *Compare* 42 U.S.C. § 2000e-5(c) *and Love v. Pullman Co., supra,* 404 U.S. at 525 & n.4, *with* N.Y. Executive Law § 297(1) (Human Rights Law) (McKinney 1972). *See* Motion for Summary Judgment, at 12-16 & Exhibits C, D & E, filed February 14, 1978.

Assuming *arguendo,* however, that plaintiff's proceeding under state law was commenced upon the EEOC's referral to the New York State Division of Human Rights by letter of June 15, 1976, the 60-day deferral period would have run on August 14, 1976, 52 days after the applicable time period for filing a charge based on plaintiff's discharge on August 29, 1975, had expired. 42 U.S.C. §§ 2000e-5(c), 2000e-5(e). Therefore, the EEOC could not have filed plaintiff's charge of discrimination until after the statutory time period for the filing of such a claim had passed.

At this point I feel I must point out what appear to me to be anomalous procedural modes of action within § 2000e-5(c) and § 2000e-5(e) of Title VII. As noted above, in view of the method that plaintiff utilized to bring his claim before the EEOC, plaintiff's charge could not have been deemed filed by the EEOC under § 2000e-5(c) until August 14, 1976, at the earliest unless the Division of Human Rights had terminated its proceedings in less than 60 days. If, however, plaintiff on June 15, 1976, went directly to the New York State Division of Human

Rights and instituted a proceeding before that agency and thereafter, within the next 8 days, notified the EEOC of his charge, then under § 2000e-5(e) his charge would have been deemed filed on June 23, 1976, the 300th day after his discharge, and would have been timely. This second procedural route, however, was not followed by the plaintiff in this lawsuit.

Despite this anomaly I perceive of no sound reasons for recognizing a toll of Title VII's time requirements in this case. *See Electrical Workers Local 790 v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976); *Keyse v. California Texas Oil Corp.,* 442 F. Supp. 1257, 1259 (S.D.N.Y. 1978). Although the time requirement for the filing of a charge with the EEOC functions as a statute of limitations, *see Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 371-72 (1977); *but see Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 240; *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 47, and procedural requirements in a private "complaint" action should be viewed with liberality, *e.g., Smith v. American President Lines, Ltd., supra,* 571 F.2d at 105, a toll under the circumstances of this case would only work to circumvent the dictates of Title VII itself.

Plaintiff was in no way hindered from pressing his charge of employment discrimination in any appropriate forum, *see, e.g. Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 47-49, and the record before the EEOC reveals that plaintiff, who attended a law school for a period of two years, was represented by counsel at some point during proceedings before the EEOC and therefore, at least up until that time, obviously had opportunities to acquire knowledge of his rights and responsibilities under Title VII, *see, e.g., Smith v. American President Lines, Ltd., supra,* 571 F.2d at 109-10.

In my judgment, plaintiff has not demonstrated that the circumstances of this case would justify a toll. *Compare Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 236-40 *and Smith v. American President Lines, Ltd., supra,* 571 F.2d at 108-11, *with Dartt v. Shell Oil Co.,* 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court,* 434 U.S. 99 (1977) *and Reeb v. Economic Opportunity Atlanta, Inc.,* 516 F.2d 924 (5th Cir. 1975). Furthermore, in my opinion, it would not be

appropriate to toll this time requirement in favor of a plaintiff who waited 292 days from the date of the alleged violation to notify the EEOC. *See generally Olson v. Rembrandt Printing Co.,* 511 F.2d 1228, 1231-33 & n.11 (8th Cir. 1975) (en banc).

Section 2000e-5(e) establishes a 180-day period of limitations on the filing of a charge with the EEOC if such charge arose in a state or political subdivision that does not have a "706 agency." This period of limitations is extended to 300 days if the alleged violation occurred in a state or political subdivision that has a "706 agency." The additional 120 days are intended to compensate for the deferral periods of Title VII and to allow a charging party additional time to pursue state-created remedies. *See Moore v. Sunbeam Corp.,* 459 F.2d 811, 825 n.35 (7th Cir. 1972) (Stevens, J.). Under § 2000e-5(e), as previously noted, a charging party could commence a proceeding before a "706 agency" 299 days after the alleged violation occurred and file a charge with the EEOC on the very next day. Nonetheless, under this same section, a charging party who, let us say 100 days after the alleged violation occurred, commences a proceeding before a "706 agency" and who is notified within 170 days that his proceeding has been terminated by that "706 agency" will be required to file his charge with the EEOC before the expiration of 300 days from the date the alleged violation occurred.

Similarly, under § 2000e-5(c), when a charging party notifies the EEOC of an alleged violation that occurred in a state or political subdivision that has a "706 agency" prior to the commencement of a proceeding under state or local law, the EEOC may not file that charge before the expiration of 60 days after such a proceeding is commenced unless it is earlier terminated. Therefore, a charging party who has not first instituted a proceeding before a "706 agency" under circumstances as described above, must, unless the state or local proceeding is swiftly terminated, notify the EEOC of the alleged violation at least 240 days after the date of the alleged violation if he wishes his charge to be timely.

Although at first glance these time periods may appear unjust it must be remembered that such limitations are legislative enactments not reviewable in this Court. Furthermore, it is readily observable, that, in general, the periods

of limitation will be longer than 180 days for those individuals, like plaintiff, who have alleged a violation occurring in a state or political subdivision that has a "706 agency." Yet,

> [t]here is no suggestion [in the legislative history of Title VII] that complainants in some states were to be allowed to proceed with less diligence than those in other states.

Moore v. Sunbeam Corp., supra, 459 F.2d at 825 n.35. Thus, to recognize a toll in favor of a plaintiff who waited 292 days after the alleged violation occurred to notify the EEOC would not, in my judgment, be in keeping with the congressional purpose of ensuring "expedition in the filing and handling" of such cases. *Love v. Pullman Co., supra,* 404 U.S. at 526.

It has been held that the time period within which to file a charge under Title VII does not begin to run until the facts that would support such a charge are or should be apparent to a reasonably prudent individual. *See Reeb v. Economic Opportunity Atlanta, Inc., supra,* 516 F.2d at 931. It should be emphasized, however, that plaintiff, in his letter to the EEOC, stated that he "was suspicious. . . right at the start" of his employment with defendant Mohasco Corporation that he might be the victim of discrimination. Also, plaintiff's complaint alleges that he was the target of harassment and mental abuse from the first day of his employment with defendant Mohasco Corporation. (Complaint, ¶ 37). Furthermore, plaintiff's complaint demonstrates that plaintiff was or should have been aware of the essential elements of his claim of employment discrimination well within the time requirements for filing of a charge, *i.e.,* some eight months prior to his sending a letter to the EEOC encompassing a charge of violation of Title VII. (See Complaint, ¶¶ 59, 60).

In addition, plaintiff's assertion in his complaint filed on November 23, 1978, of a continuous pattern of identifiable discriminatory conduct, which was not alleged in his charge filed with the EEOC, does not, in my judgment, work to save plaintiff's untimely charge of discriminatory discharge. *See, e.g., Smith v. American President Lines, Ltd., supra,* 571 F.2d at 105-106; *Laffey v. Northwest Airlines, Inc.,* 567 F.2d 429, 473-74 (D.C. Cir. 1976),

cert. denied, 434 U.S. 1086 (1978); *Carter v. Delta Air Lines, Inc.,* 441 F. Supp. 808, 811-12 (S.D.N.Y. 1977). This ruling is further supported by Part III of this memorandum-decision and order.

Plaintiff, however, requests this Court to rely on an EEOC regulation and hold that his charge was timely filed. Plaintiff cites 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977) which states:

> In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th day following the alleged act of discrimination, without notification to the Commission of such termination, the Commission will consider the charge to be filed with the Commission on the date the person making the charge was notified of the termination.

But see 29 C.F.R. § 1601.12(b)(1)(iii) (1977).

The period of limitation for filing a complaint with the New York State Division of Human Rights is one year. N.Y. Executive Law § 297(5) (McKinney Supp. 1977). Therefore, if August 29, 1975, is taken as the date on which the plaintiff's claim arose, then both the deferral by the EEOC to the Division of Human Rights by letter dated June 15, 1976, and the filing of plaintiff's verified complaint with the Division of Human Rights on August 12, 1976, were timely. Furthermore, if 29 C.F.R. § 1601.12 (b)(1)(v)(A) (1977) is accepted as controlling, then plaintiff's charge must be deemed filed with the EEOC on June 23, 1976, the 300th day following the alleged violation of his Title VII rights. Following this line of reasoning, plaintiff's judicial complaint, which was filed on November 23, 1977, or

91 days after the EEOC's transmittal of a notice of right to sue to the plaintiff, would have been timely. *See generally Kirk v. Rockwell International Corp.,* 578 F.2d 814, 819 (9th Cir. 1978); *Tavernaris v. Beaver Area School District,* 454 F. Supp. 355 (W.D. Pa. 1978).

In my judgment, this regulation cannot be used to save plaintiff's private "complaint" suit. Initially, it should be noted that the EEOC did not mail defendant Mohasco Corporation notice of plaintiff's charge within 10 days of June 23, 1976, nor does it appear that the EEOC began processing plaintiff's charge on June 23, 1976. In fact, the EEOC's notice of deferral to the New York State Division of Human Rights indicated that plaintiff's charge would be filed *at the expiration of the deferral period* unless the EEOC was notified of an earlier termination of proceedings by the Division of Human Rights. (Motion for Summary Judgment, Exhibit B, filed February 14, 1978). Therefore, the record before the EEOC is consistent only with the view that the EEOC deemed plaintiff's charge to have been filed at the expiration of the 60-day deferral period.

Although the EEOC accepted plaintiff's charge as timely, there is nothing in the record to show the basis for such a determination. Furthermore, it does not appear that plaintiff relied on 29 C.F.R. § 1601.12(b)(1)(v)(A) when he notified the EEOC of his charge of discrimination. One thing is clear, however, and that is that this Court is not bound to accept the EEOC's determination in this respect as binding. *E.g., Weise v. Syracuse University, supra,* 522 F.2d at 413; *Carter v. Delta Air Lines, Inc., supra,* 441 F. Supp. at 812.

Moreover, in my opinion, 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977) appears to be contrary to the plain language of 42 U.S.C. § 2000e-5(c) which states that under circumstances as presented herein "no charge may be filed" by the EEOC before expiration of 60 days after proceedings have been commenced before a "706 agency" unless such proceedings have been earlier terminated.

It is interesting to note that this precise language of § 2000e-5(c) was the subject of discussion during congressional debate concerning the 1972 amendments that became the Equal Employment Opportunity Act of 1972. A pronouncement of the managers at the conference on the

bill to amend Title VII states:

> The Senate amendment contained two provisions allowing the Commission to defer to state and local equal employment opportunity agencies. It deleted the language of existing law providing that no charge may be filed during the 60-day period allowed for the deferral and substituted a provision prohibiting the Commission from acting on such a charge until the expiration of the 60-day period. The House bill made no change in existing law. The Senate receded with an amendment that would restate the existing law on the deferral of charges to state agencies. The conferees left existing law intact with the understanding that the decision in *Love v. Pullman,* [404 U.S. 522] (1972) interpreting the existing law to allow the Commission to receive a charge (but not act on it) during such deferral period is controlling.

Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for America Workers, *reprinted in* U.S. Cong. & Ad. News 2179, 2181 (1972).

It is not at all clear to me what the congressional purpose was behind this passage. In my opinion, the managers' reference to *Love* can only be viewed as directed toward a problem not encountered in this case. In *Love v. Pullman Co., supra,* all the Supreme Court held was that a charging party's failure to first file with an existing "706 agency" is not fatal to the subsequent prosecution of a charge of discrimination and that the statutory requirement of deferral to a "706 agency" necessarily created an exception to an EEOC regulation, 29 C.F.R. § 1601.11(b) (1977), which provided that a charge is deemed filed upon receipt by the EEOC. The Court merely approved of the practice of the EEOC whereby it would hold a charge of discrimination in "suspended animation" during the deferral period and then formally or automatically file it upon termination of the state or local proceedings. It is important to note that in *Love* the state proceeding was terminated and plaintiff's charge of discrimination was deemed filed by the EEOC at a time when the statutory time period had not yet passed. The plaintiff in *Love*

had alleged a continuing violation of Title VII and therefore the issue before the Supreme Court concerned only whether a second "filing" *within the statutory time requirement* was mandated by Title VII. I should further note that I find inapplicable the Supreme Court's equating of "holding a charge in suspended animation" and "holding a charge in abeyance" in the context of the issue before this Court. *Love v. Pullman Co., supra,* 404 U.S. at 526-27 n.6. *Compare* 42 U.S.C. § 2000e-5(c) ("*no charge may be filed*. . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. . . .") (emphasis added) *with* 42 U.S.C. § 2000e-5(d) ("[i]n the case of any *charge filed* by a member of the Commission. . .the Commission shall, before taking any action with respect to such charge, notify the appropriate [706 agency] . . . and, upon request, afford them a reasonable time, but not less than sixty days . . .to act. . . . ") (emphasis added). In my judgment, there is a substantial difference between "holding a charge in suspended animation prior to filing" and "holding a charge in abeyance prior to processing" when what is at issue and is to be measured is the time period within which to file a charge.

Although there is authority, based on an analysis of *Love,* for the proposition that initial receipt by the EEOC of a Title VII charge prior to initiation of a proceeding before an existing "706 agency" tolls the time requirements for the filing of a charge with the EEOC, *see Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); *Vigil v. American Telephone & Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972), it is not binding on this Court and I do not find its reasoning persuasive. Rather, I concur in the analysis and reasoning of Justice Stevens (then Circuit Judge) in *Moore v. Sunbeam Corp., supra,* 459 F.2d at 822-26, in which the Court of Appeals, Seventh Circuit, held that the filing date for purposes of Title VII's time requirements is the date of expiration of the 60-day deferral period unless the "706 agency" earlier terminates its proceedings. *See also Doski v. M. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976); *Olson v. Rembrandt Printing Co., supra,* 511 F.2d 1228 (8th Cir. 1975) (en banc). In addition, I believe that this reasoning is further supported by the Supreme Court's decision in *Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 236-40, wherein the Court refused to

extend this limitations period beyond the limits already established by Congress.

Therefore, while recognizing that the law in this area seems unsettled and confused, it is my judgment that to the extent 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977) seems contrary to the plain, although still complicated, language of § 2000e-5(c) and § 2000e-5(e) of Title VII, I find this regulation to be unauthorized by the statute. If this regulation is viewed as a legislative rule, in my opinion, it should be considered invalid because it was not promulgated pursuant to a statutory grant of power to make law, *see* 29 C.F.R. § 1601.12(a) (1977), authorizing the EEOC to extend the time requirements of Title VII. *See generally* 42 U.S.C. § 2000e-12(a); *General Electric Co. v. Gilbert,* 429 U.S. 125, 140-45 (1976); *National Nutritional Foods Association v. Weinberger,* 512 F.2d 688, 696 (2d Cir.), *cert. denied,* 423 U.S. 827 (1975). In addition, if it is to be viewed as an interpretative rule, this regulation is not entitled to "great deference" with regard to the issue before this Court, *see Pacific Gas & Electric Co. v. Federal Power Commission,* 506 F.2d 33, 37 n.14 (D.C. Cir. 1974), and because, in my judgment, it is in conflict with Title VII itself, I find that this regulation does not have the force of law and is ineffective in this situation. *See Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 240; *Morton v. Ruiz,* 415 U.S. 199, 237 (1974); *Moore v. Sunbeam Corp., supra,* 459 F.2d at 824. Moreover, it does not appear in the record that the EEOC ever relied on this regulation with respect to plaintiff's charge.

It is clear that Congress, in enacting Title VII, was concerned with the expeditious filing and disposition of such cases. *E.g.,* 42 U.S.C. § 2000e-5(f)(5). Yet, when the EEOC was given enforcement powers under the Equal Employment Opportunity Act of 1972 another important change was enlargement of the time requirements for the filing of a charge and commencement of a judicial action by a person claiming to be aggrieved. Pub. L. 92-261, § 4, March 24, 1972, 86 Stat. 104-105.

If the EEOC, in fact, followed the procedures advocated by the plaintiff, the EEOC would have deemed plaintiff's charge filed on the 300th day following termination of his employment, *i.e.,* June 23, 1976, thereby administratively reducing the 60-day deferral period mandated

by § 2000e-5(c) to a total of only 8 days. This would have been 49 days before plaintiff actually filed his verified complaint with the New York State Division of Human Rights -- such filing being clearly in conflict with the deferral policy of Title VII. This, in my judgment, the EEOC is not empowered to do. It is for Congress in its wisdom to further extend these present time requirements legislatively and not for administrative or judicial tribunals to so rule. *See Electrical Workers Local 790 v. Robbins & Myers, Inc., supra,* 429 U.S. at 240; *DeMatteis v. Eastman Kodak Co.,* 511 F.2d 306, 311 (2d Cir.), *modified on rehearing,* 520 F.2d 409 (2d Cir. 1975); *Keyse v. California Texas Oil Corp., supra,* 442 F. Supp. at 1259.

III

The defendants have raised several additional issues, one of which I believe should be addressed. Defendants contend that because plaintiff's charge filed with the New York State Division of Human Rights and the EEOC did not allege a continuing violation of Title VII, the allegations in plaintiff's judicial complaint concerning acts of continuing and post-employment discrimination should be dismissed.

The gravamen of plaintiff's letter received by the EEOC on June 15, 1976, is very specific in nature, stating that plaintiff was both hired and fired because of his religion, and in my judgment does not set forth a claim of a continuous violation. Additionally, plaintiff's verified complaint filed with the New York State Division of Human Rights is unquestionably limited to a claim of discriminatory discharge. Therefore, it is clear to me that the scope of the ensuing EEOC investigation was necessarily limited to the period of plaintiff's employment with defendant Mohasco Corporation. *See Hubbard v. Rubbermaid, Inc.,* 436 F. Supp. 1184, 1190-93 (D. Md. 1977).

In my judgment, plaintiff's EEOC charge can be construed to allege only an isolated set of discriminatory circumstances directed at his own employment with defendant Mohasco Corporation and not a continuing wrong. Furthermore, plaintiff's allegations of continuing violations and post-employment discrimination in this civil action are, in my judgment, not similar or reasonably related to the acts or omissions alleged in his charge filed with the EEOC and are not such as one might reasonably expect to grow out of

that charge. *See, e.g., Ortega v. Construction & General Laborers' Union,* 396 F. Supp. 976, 980 (D. Conn. 1975).

This does not mean, however, that, under any set of circumstances, plaintiff's claim of post-employment discrimination in connection with statements made to prospective employers would not have been cognizable in this Court under Title VII if the proper preliminary administrative procedures had been followed. *See* 42 U.S.C. § 2000e-3; *Pantchenko v. C. B. Dolge Co.,* ___ F.2d ___, Slip Op. 4461 (2d Cir. August 15, 1978); *Dubnick v. Firestone Tire & Rubber Co.,* 355 F. Supp. 138, 140-41 (E.D.N.Y. 1973).

Title VII's statutory scheme mandates that a person alleged to be aggrieved not bypass the administrative machinery of the EEOC by seeking initial enforcement of Title VII rights in the courts. If a charging party does not utilize the administrative remedies made available by Congress, then such remedies might just as well not exist and alleged violations would be first tested in courts of law rather than through preliminary deferment to a specialized agency and informal methods of conciliation.

Thus, in my judgment, no circumstances have been shown that would warrant a finding of continuing and post-employment discrimination growing out of plaintiff's charge filed with the EEOC. *See, e.g., Ferguson v. Mobil Oil Corp.,* 443 F. Supp. 1334, 1337-40 (S.D.N.Y. 1978). Therefore, all allegations in plaintiff's judicial complaint not contained in his EEOC charge should be dismissed. *See, e.g., United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977); *Smith v. American President Lines, Ltd., supra,* 571 F.2d 106-107 n.7; *Ostapowicz v. Johnson Bronze Co.,* 541 F.2d 394, 398-99 (10th Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977); *East v. Romine, Inc.,* 518 F.2d 332, 336-37 (5th Cir. 1975); *Aungst v. J. C. Penny Co.,* Civil No. 77-1287 (W.D. Pa. August 23, 1978); *Edwards v. North American Rockwell Corp.,* 291 F. Supp. 199, 203-205 (C.D. Cal. 1968).

IV

Cases such as this are not easy ones and the review that was necessary of the voluminous submissions, statutes, and regulations most difficult. Nonetheless, courts are increasingly being called upon to decide delicate issues in this developing field of law. Thus, in situations such as this it

can readily be seen that it is desirable for litigants to utilize effective and feasible administrative remedies, in accordance with proper procedural requirements, prior to entering the courthouse. Individuals claiming discrimination in employment in violation of these new laws are entitled to have their charges expeditiously and conclusively determined. Yet, at the same time it is important to remember that those on the defense side who have been alleged to have violated the mandates of our equal employment opportunity laws, a most serious charge, also have rights that should not be overlooked or minimized.

Accordingly, the motion to dismiss made by defendants Curren, Greenhill, Woller, Brown, and Cullen is hereby granted on the ground of lack of jurisdiction over the subject matter because plaintiff failed to file a Title VII charge with the EEOC naming these individuals as respondents. Defendant Mohasco Corporation's motion for summary judgment is granted and judgment shall enter in its favor dismissing the complaint against it as a matter of law on the ground of lack of jurisdiction over the subject matter because of the lack of a timely filing with the EEOC. Therefore, the complaint is dismissed in its entirety.

It is so Ordered.

Dated: October 17, 1978
Albany, New York

s/ JAMES T. FOLEY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the SECOND CIRCUIT

No. 1112 – August Term, 1978.

(Argued June 7, 1979 Decided July 18, 1979.)

Docket No. 78-7595

RALPH H. SILVER,

Plaintiff-Appellant,

–v.–

MOHASCO CORPORATION, EDWARD CURREN, RAYMOND GREENHILL, FREDERICK WOLLER, HERBERT BROWN and JAMES CULLEN,

Defendants-Appellees.

Before:

KAUFMAN, *Chief Judge,*
OAKES and MESKILL, *Circuit Judges.*

KAUFMAN, *Chief Judge:*

In this case, in which we are called upon to interpret Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, Learned Hand's admonition is particularly appropriate:

> There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it.[1]

We believe that the district court failed to attach sufficient weight to the overriding purpose of the Act.

I

Title VII is a statute "rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced lawyer," *Egelston v. State University College at Geneseo,* 535 F.2d 752, 754 (2d Cir. 1976), not to mention a layman such as the appellant Ralph H. Silver. On August 29, 1975, Silver was discharged from his position as a senior marketing economist with appellee Mohasco Corporation. During his thirteen-month tenure, Silver, who is of the Jewish faith, came to believe he was the target of harassment by Mohasco executives because of his religious beliefs.[2] Silver alleged Mohasco wished to induce him to resign, and that he was discharged when he refused to do so.

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1 *Federal Deposit Insurance Corp. v. Tremaine,* 133 F.2d 827, 830 (2d Cir. 1943).

2 We, of course, express no view on the merits of Silver's substantive allegations of discrimination.

Sometime after his discharge, Silver concluded that Mohasco's treatment of him was part of a carefully conceived plan under which Jews and other minorities were hired, harassed, and fired in a systematic fashion. This scheme, Silver believed, was designed to erect a facade of equal employment opportunity at Mohasco.

Thus, on June 15, 1976, some 291 days after his discharge, Silver wrote to the Buffalo office of the Equal Employment Opportunity Commission (EEOC). In his letter, Silver alleged that he had been hired and subsequently discharged because of his religion, and detailed the substance of his charge against Mohasco. Silver concluded by characterizing it as a "rough, incomplete and hastily drafted complaint."

Upon receiving Silver's communication, the EEOC set into motion the complex procedural machine established by Title VII. The Commission immediately forwarded the letter to the New York State Division of Human Rights (NYSDHR). Under § 706(c) of the statute, that agency must be given sixty days to process a charge before the EEOC may act.[3] Accordingly, the EEOC advised NYSDHR

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3 *See* Title VII of the Civil Rights Act of 1964, § 706(c), 42 U.S.C. § 2000e-5(c) [hereinafter cited as § 706(c)]:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purpose of this sub-

that it would automatically file the charge at the expiration of the deferral period. The EEOC formally processed Silver's charge on August 20, 1976.[4]

On August 12, Silver complied with an NYSDHR request that he file a formal complaint.[5] Nineteen days later, Silver wrote to both NYSDHR and the EEOC, detailing his suspicions that Mohasco had been "blacklisting" him by supplying unfavorable references to prospective employers. On February 9, 1977, NYSDHR, without discussing the allegations of blacklisting, announced its conclusion that there was not probable cause to believe Silver had been discharged because of his religion.

At this point the proceedings shifted back to the EEOC. That agency, which had deferred any investigation of Silver's claim until NYSDHR issued its findings, adopted them as its own on August 24, 1977. Finally, in compliance with another procedural mandate of Title VII, the EEOC issued a "right to sue" letter to Silver, enabling him to pursue his charges in federal district court.[6] This he did promptly by filing his complaint on November 23, 1977. Mohasco responded by moving for summary judgment, which Judge Foley granted.[7]

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section at the time such statement is sent by registered mail to the appropriate State or local authority.

NYSDHR is the state agency established under N. Y. Exec. Law §293 (McKinney 1972) to consider employment discrimination claims.

4 The EEOC calculated the sixty-day deferral period as beginning on June 15, 1976, the day on which the Commission referred Silver's letter to NYSDHR. Under this view, the deferral period ended on August 14, 1976.

5 The district court concluded that Silver's charge was first "filed" with the state agency on this date. *See Silver v. Mohasco Corp.*, No. 77-CV-472, slip op. at 11 (N.D.N.Y. Oct. 17, 1978). We address this contention in note 10 *infra.*

6 *See* Title VII of the Civil Rights Act of 1964, §706(f)(1), 42 U.S.C. §2000e-5(f)(1).

7 Silver's complaint named as defendants the Mohasco Corporation and several individual Mohasco executives. In its answer, filed December 29, 1977, the corporation acknowledged Silver's

Silver, the judge held, had failed to file his charge with the EEOC within 300 days of his discharge, as required by § 706(e) of Title VII.[8] Moreover, Judge Foley concluded that he could not consider Silver's allegations of blacklisting because they had not been investigated by either the EEOC or NYSDHR. We are of the view that both rulings were erroneous.

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letter to the EEOC of June 15, 1976, but asserted, as an affirmative defense, that the letter was not "filed" as a matter of law on that date. On January 27, 1978, the individual defendants moved to dismiss under Fed.R.Civ.P. 12(b)(6) on the ground they did not receive proper notice of any EEOC investigation. Shortly thereafter, on February 14, the corporate defendant moved for summary judgment under Fed.R.Civ.P. 56, alleging that Silver's claim was time-barred under Title VII.

The district judge granted both motions in a single opinion filed on October 17, 1978. As to the individual defendants, we agree with Judge Foley that, because they were not notified of any EEOC investigation of their individual conduct, these defendants could not be included in Silver's complaint. *See Travers v. Corning Glass Works,* 76 F.R.D. 431 (S.D.N.Y. 1977) (Weinfeld, J.).

8 A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(e) [hereinafter cited as § 706(e)].

II

The resolution of this appeal hinges on determination of the date when a charge is considered "filed" with the EEOC. This superficially simple issue is complicated by the plethora of overlapping procedural requirements that pervade Title VII. Nonetheless, we believe that much of this complexity is overcome by fidelity to the fundamental policies embodied in Title VII. Indeed, our approach accords with the relevant case law, the legislative history, and the considered judgment of the EEOC.

A.

The crucial importance of "filing" under Title VII stems from the mandate of § 706(e) that, when a state has created an agency to hear employment discrimination claims, a charge must be "filed" with the EEOC within 300 days of the alleged discrimination.[9] *See International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). Unfortunately, this requirement becomes less than clear when considered together with § 706(c), which states that "no charge may be filed" with the EEOC, until sixty days after state agency proceedings have commenced.

Confronted with these two provisions, the able district court judge read § 706(c) literally. He reasoned that even when a charge is received by the EEOC well within 300 days of the alleged discrimination, it cannot be considered "filed" with that office until sixty days after referral to the state agency. Thus, according to Judge Foley, Silver's charge, albeit received by the EEOC 291 days after his discharge, was not "filed" before August 14, 1976, 352 days subsequent to the termination of his employment.[10]

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9 If, however, a state has not created such an agency, a charge must be filed with the EEOC within 180 days after the alleged violation. *Id.*

10 Because the district court concluded that the state agency proceeding did not commence until August 12, *see* note 5 *supra*, it determined that the sixty-day deferral period could not end before October 12. *Silver v. Mohasco Corp.*, No. 77-CV-472, slip op. at 11 (N.D.N.Y. Oct. 17, 1978). We believe, however, that the state proceedings "commenced" under § 706(c) on June 15, 1976, when Silver's letter was forwarded to NYSDHR by the EEOC. That a state law may require a formal filing becomes irrelevant to a determination of when the state proceeding "commences" for purposes of the federal statute. This conclusion is compelled by the Supreme Court's recent decision in *Oscar Mayer & Co. v. Evans*, 47 U.S.L.W. 4569, 4572 (U.S. May 21, 1979), that a state proceeding can be "commenced" for purposes of § 14(b) of the Age Discrimination in Employment Act, 29 U.S.C. § 633(b), even after the state statute of limitations has run. Moreover, the Court concluded that this construction of § 14(b) is consistent with interpretation of the virtually identical language of § 706(c). *See* 47 U.S.L.W. at 4571.

Accordingly, Judge Foley determined that Silver was barred by the 300-day jurisdictional prerequisite of § 706(e).

The district court decision would, therefore, require a Title VII complainant to file his charge with the state agency within 240 days of discharge or forfeit the opportunity to bring his complaint before the EEOC. We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is "filed" for purposes of § 706(e) when received, and "filed" as required by § 706 (c) when the state deferral period ends.

B.

In interpreting the filing provisions of Title VII, our lodestar must be the statute's fundamental purpose. In view of the strong federal policy in ensuring that employment discrimination is redressed, this court has consistently eschewed rigid construction of Title VII's procedural mandates. *See Egelston, supra*, 535 F.2d at 753-55; *accord, Weise v. Syracuse University*, 522 F.2d 397, 412 (2d Cir. 1975); *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 892 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972). Accordingly, we have resisted any temptation to require technical precision of Title VII plaintiffs, who often proceed without counsel. *See Oscar Mayer & Co. v. Evans*, 47 U.S.L.W. 4569, 4571 (U.S. May 21, 1979) (stressing the remedial purposes of employment discrimination statutes).[11]

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11 The Supreme Court in *Oscar Mayer* cited our decision in *Voutsis, supra*, with approval. *See* 47 U.S.L.W. at 4571, 4572.

Thus, it is the Supreme Court's decision in *Love v. Pullman Co.*, 404 U.S. 522 (1972), that best illuminates the path we travel in arriving at our decision in this case. In *Love,* the Supreme Court liberally construed the filing provision of § 706(c) and decided that a charge submitted initially in error to the EEOC may be kept in "suspended animation" by the Commission and automatically referred to the appropriate state agency. 404 U.S. at 526. After the sixty-day deferral period ended, the Court concluded, the EEOC may begin its own investigation. *Id.* Thus, the Court spared the unwary litigant of the obligation of "filing" a second EEOC charge sixty days after the first one was sent to the state agency, the proper recipient.

In our view, the clear import of *Love* is that a charge held, like Silver's, in "suspended animation," is "filed" under § 706(e) when the EEOC *first* receives it, and not when the sixty-day period ends.[12] As the *Love* Court

12 It has been argued that if "filing" in § 706(c) is not interpreted consistently with "filing" in § 706(e) a number of anomalies will arise. For example, we are told that if our construction of § 706(c) is adopted, a complainant in a state that has created an agency to process his charge has 300 days to file with the EEOC even if he does not file with the state first, although a complainant in a state without such an agency has only 180 days. See § 706(e); *Moore v. Sunbeam Corp.*, 459 F.2d 811, 825 n.35 (7th Cir. 1972).

Equally "anomalous procedural modes" however, arise under the district court judge's interpretation, as he himself recognized. *Silver v. Mohasco Corp.*, No. 77-CV-472, slip op. at 12 (N.D.N.Y. Oct. 17, 1978). Specifically, if NYSDHR had completed its investigation of Silver's charge within nine days, it would have been deemed "filed" with the EEOC on the 300th day and § 706(e) would have been satisfied. Because the state agency proceeding exceeded nine days, however, Silver was denied access to a federal forum. Thus, a complainant's fate would rest entirely with the state agency, a result specifically at odds with § 706(c)'s mandate that a state's procedural requirements "cannot foreclose federal relief." *Oscar Mayer & Co., supra,* 47 U.S.L.W. at 4573. Where, as here, both constructions lead to illogical treatment of similarly situated complainants, we prefer the interpretation that best vindicates the statutory purpose.

noted, to construe the statute to require a second "filing" after the state proceedings had concluded would create an additional procedural obstacle without advancing the purposes of the statute. 404 U.S. at 526-27.[13] We therefore hold that Silver's charge was "filed" under § 706(e) on June 15, 1976, 291 days after he was discharged and well within the 300-day limit.[14] In sum, we believe the requirement in § 706(c) that no charge be "filed" before the deferral period ends simply means that the EEOC may not process a Title VII complaint until sixty days after it has been referred to a state agency.

This interpretation not only serves the concern of Title VII for individual rights, but also comports with the overarching procedural scheme embodied in the statute. There is little doubt that § 706(c) is designed solely to provide state agencies with an opportunity, before the federal agency intervenes, to resolve disputes between employer and employee. *Oscar Mayer & Co., supra,* 47 U.S.L.W. at 4572; *accord, Love, supra,* 404 U.S. at 526; *Voustis, supra,* 452 F.2d at 892. Viewed in this light, it is clear that, because the charge is referred to the local agency after it is "filed" with the EEOC, appropriate respect is accorded the states. Moreover, in no sense can Title VII defendants be said to suffer prejudice or surprise under our reading of § 706(c), for the interpretation we have adopted does not countenance the filing of stale claims. *See Occidental Life*

13 Although there is language in *Love* that can be construed as suggesting that a charge is "filed" after the sixty-day period ends, *see, e.g.,* 404 U.S. at 526 & n.5; *Moore, supra,* 459 F.2d at 824, this reading is contradicted both by the passage cited in text and by the "clear import" of the Court's analysis, *Vigil v. American Telephone & Telegraph Co.,* 455 F.2d 1222, 1224 (10th Cir. 1972).

14 We find no merit in appellee's contention that if a charge is "filed" with the EEOC and then forwarded to a state agency, it is not "initially instituted" with the state as required by § 706(e). Appellee asserts that in such a situation the complainant has only 180 days to file with the EEOC. *Love* clearly recognizes that the EEOC may satisfy the deferral requirements of Title VII itself by simply notifying the state agency that a charge has been received. *See* 404 U.S. at 525-26.

Insurance Co. v. EEOC, 432 U.S. 355, 372 (1977); *accord, Love, supra,* 404 U.S. at 526. In the instant case appellee had ample notice of the proceedings before the state agency, EEOC, and the district court, which occurred in the sequence envisioned by Title VII. In such a case, we are compelled to reaffirm our conclusion in *Voutsis, supra,* 452 F.2d at 892 (footnote omitted):

> To place an unnecessary stumbling block in the private litigant's path, particularly when the national enforcement agency has carried out the federal mandate of accommodation to state action, would be hypertechnical and overly legalistic, and would improperly shield a discriminatory organization from the reach of civil litigation.

The views of three of the four circuits that have considered the precise question before us are substantially in accord with our own. *See Vigil v. American Telephone & Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); *Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972).[15] Indeed, the *Vigil* court stated that the statutory construction we adopt today follows inexorably from the decision of the Supreme Court in *Love. See* 455 F.2d at 1224.

Only the Seventh Circuit has held otherwise. In *Moore v. Sunbeam Corp.,* 459 F.2d 811 (7th Cir. 1972), then-judge Stevens relied on a literal reading of the statute to prevent the EEOC from "filing" a charge until sixty days after its "receipt."[16] In our view, the statute's legislative history and

15 We do not reach the question, decided affirmatively by all three circuits, whether initial receipt of the charge by the EEOC "tolls" the § 706(e) statute of limitations. Rather, we interpret § 706(c) in a manner consistent with the result reached in *Vigil, Anderson,* and *Richard.* Moreover, we note that the Tenth Circuit employed our statutory construction as an alternative ground in *Vigil, supra,* 455 F.2d at 1224.

16 We note that the Supreme Court eschewed a literal reading of a nearly identical provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633(b), in *Oscar Mayer, supra,* over a dissent by Justice Stevens, 47 U.S.L.W. at 4574.

clearly stated remedial function foreclose this result. We, therefore, disagree with the statutory construction adopted by the Seventh Circuit.[17]

C.

We note also that the legislative history of Title VII is not silent on the question before us. Indeed, before the statute was amended in 1972,[18] the Senate passed a bill designed to make explicit the construction we are adopting today. *See* S.2515, 92d Cong., 2d Sess., 118 Cong. Rec. 289, 290 (1972).[19] The House-Senate Conference Committee, however, retained the pre-1972 language because "[n]o change in these provisions was deemed necessary in view of the recent Supreme Court decision of *Love v. Pullman Co.,*" 118 Cong. Rec. 7564 (1972). Moreover, the Conference Committee explicitly endorsed the decision of the Tenth Circuit in *Vigil* and stated that "in order to protect the aggrieved person's right to file with the EEOC within the time periods specified . . . , a charge filed with a State or local agency may also be filed with the EEOC during the 60-day

17 The reliance of Judge Meskill and the Seventh Circuit on the "compromise which made it possible to pass the Civil Rights Act," 459 F.2d at 820-21, is rendered inappropriate by the clear legislative history of the 1972 Amendments to the statute. *See* Part II.C & note 19 *infra.* Because the events in *Moore* transpired before these Amendments took effect, the court refused to consider their impact. *See* 459 F.2d at 829-30. We are not so precluded.

18 *See* Pub.L. No. 92-261, 86 Stat. 103 (1972).

19 S. 2515 would have removed any reference to "filing" in §706(c) and would have stated instead that "the Commission shall take no action" before the expiration of the sixty-day deferral period. The Senate asserted that

> [t]he present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language *clarifies* the present statute by permitting the charge to be filed but prohibiting the Commission from taking action with respect thereto until the [deferral] period has elapsed.

S.Rep.No. 92-415, 92d Cong., 1st Sess. 36 (1971) (emphasis added).

deferral period." *Id.* It appears clear, therefore, that Congress accepted our interpretation of the statute as correct.

Finally, in cases arising under Title VII, we must accord "considerable deference" to the interpretations of the EEOC, the agency charged with administration of the statute. *Egelston, supra,* 535 F.2d at 755, n.4; *accord, Oscar Mayer & Co., supra,* 47 U.S.L.W. at 4572. The EEOC has consistently maintained that a charge is "filed" on the day it is received by the federal agency, without regard to the intervening deferral period. *See* 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977).[20] In its current regulations, the EEOC clearly states that

> [t]he timeliness of a charge shall be measured for purposes of satisfying the filing requirements of section 706(e) of Title VII by the date on which the charge is received by the Commission. 29 C.F.R. § 1601.13(a).

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20 The regulation read as follows:

> In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th day following the alleged act of discrimination, without notification to tne Commission of such termination, the Commission will consider the charge to be filed with the Commission on the date the person making the charge was notified of the termination.

The EEOC has consistently followed this administrative policy throughout the past ten years. It has filed a brief *amicus curiae* in this case, maintaining the same position.

III

We turn now to the second issue raised on this appeal - whether the district court can properly consider Silver's allegations of "blacklisting." Judge Foley determined that the scope of the EEOC's inquiry was of necessity limited to the period of Silver's employment, and that he therefore lacked power to adjudicate charges of post-employment blacklisting. We believe, however, that Title VII claimants should not be held to the precision of a code pleader.

Charges of post-employment blacklisting fall within the broad remedial scope of Title VII. *Pantchenko v. C.B. Dolge Co.,* 581 F.2d 1052, 1055 (2d Cir. 1978). And to furnish a remedy against discrimination in employment, no matter what specific form the invidious practice takes, we have embraced the same flexible approach in interpreting Title VII complaints that we have adopted in construing the statute's filing requirements. *See, e.g., Weise, supra,* 522 F.2d at 413;[21] *Noble v. University of Rochester,* 535 F.2d 756, 758 (2d Cir. 1976); *Egelston, supra,* 535 F.2d at 754-55.

We look not merely to the four corners of the often inarticulately framed charge, but take into account the "scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Smith v. American President Lines,* 571 F.2d 102, 107 n.10 (2d Cir. 1978); *accord, Tipler v. E.I. duPont deNemours & Co.,* 443 F.2d 125, 131 (6th Cir. 1971). Accordingly, we have previously construed Title VII charges to include allegations of "continuing discrimination" that occur "even after" the complaint is filed. *Noble, supra,* 535 F.2d at 758;

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21 We confronted a similar problem in *Weise* in which a Title VII complainant had been deprived of a judicial forum due to the Commission's miscomprehension of her complaint, and because the district court did not take her attempts at corrective measures into account. 522 F.2d at 413. Under such circumstances, Silver, like the complainant in *Weise,* deserves a judicial resolution of his charges.

accord, Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973); *Ortega v. Construction & General Laborers' Union,* 396 F. Supp. 976, 980 (D. Conn. 1975).[22]

Under the *American President Lines* standard, Silver's allegations of blacklisting cannot be said to have caught the EEOC by surprise. Silver alleged the existence of a comprehensive "plan" directed at Jewish executives. Indeed, the EEOC, although it did not investigate Silver's blacklisting charges, now concedes they were "reasonably related" to the original charge. *See* Brief for the Equal Employment Opportunity Commission as *Amicus Curiae,* at 15-17. Moreover, on August 31, 1976, almost a full year before the EEOC announced its findings and only eleven days after the agency commenced processing Silver's charge, he supplemented his "rough, incomplete and hastily drafted" complaint by notifying both the EEOC and the state agency of alleged blacklisting. Silver fairly presented the blacklisting charge to the Commission and he may now pursue his allegations in the district court.

Reversed and remanded.

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22 Because of our conclusion in Part II *supra,* we find it unnecessary to determine whether Silver's allegations of blacklisting constituted a claim of "continuing violations" for purposes of § 706(e). *See, e.g., Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 246 (3d Cir.), *cert. denied,* 421 U.S. 1011 (1975).

MESKILL, Circuit Judge, concurring in part and dissenting in part:

When the rights of litigants depend on the interpretation of legislation, whatever canon of statutory construction a party may fire at the opponent an equally authoritative but directly contrary shot will undoubtedly be fired in reply.[1] Caught as we are in the crossfire, it is understandable that judges sometimes wonder about the ratio of light to sound being generated by these attempts at persuasion. This, for me, is one of those times for wondering. If I were convinced, as the majority apparently is, that we must choose between interpreting the disputed statute (1) in accord with its language and contrary to its purpose, or (2) in accord with its purpose and contrary to its language, I too, following the learned canon that has been handed down to us, might have avoided over-solicitude for the letter of the statute and might have joined, without wincing, in carrying out its purpose. But we are not in such a predicament here. The majority has made a choice between two alternatives neither of which is presented by this case. Because both parties claim to have interpreted subsections 706(c) and 706(e) of Title VII in accordance with the purposes of Congress, our task is not to choose between effectuating or frustrating the purposes of Congress, but rather to determine which of the proferred interpretations in fact captures the purposes behind the words. Believing that in this case the purposes of Congress are furthered by a literal reading of these provisions, I respectfully dissent from part II of today's decision.[2]

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1 *See generally* K. Llewellyn, The Common Law Tradition: Deciding Appeals at 521-535 (1960).

2 I concur in the majority's affirmance of Judge Foley's order dismissing appellant's complaint as to the individual defendants. *See* majority's footnote 7, *supra.*

I also agree with part III of the majority opinion which states that the scope of the EEOC investigation which could reasonably have been expected to grow out of Silver's charge was sufficiently broad to encompass his allegation of blacklisting. EEOC regulations provide for the amendment of a charge to include additional unlawful practices "related to or growing out of the subject matter of the original charge." *See* 29 C.F.R. §1601.12(b) (1978); *see also* 29 C.F.R. § 1601.11(b) (1976). In August of 1976, two months after first contacting the EEOC, Silver sent to the district

Despite the much-emphasized complexity of Title VII, there is no dispute over the literal meaning of the two statutory provisions under examination. Section 706(c), the deferral provision, provides that in a state that has created an agency to hear employment discrimination claims (a "deferral state"), no charge may be filed with the EEOC until 60 days or 120 days (depending on how long the state agency has been in existence) after state proceedings have been commenced, unless such state proceedings have been earlier terminated. Section 706(e), the limitations provision, provides that charges must be filed with the EEOC within 180 days of the alleged unlawful employment practice, except that where an aggrieved party has initially instituted state proceedings, a charge must be filed with the EEOC within 300 days of the alleged unlawful practice.

The purposes behind these provisions are every bit as clear as their literal meanings. In *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972), a unanimous Supreme Court explicitly stated that the purpose of Title VII's deferral provision is "to give state agencies a prior opportunity to consider discrimination complaints" while the purpose

director a letter clearly charging Mohasco with circulating bad references. I agree with the position taken by *amicus* EEOC on appeal; whether viewed as an amendment to the earlier charge or as a new charge, this letter was sufficient to notify the EEOC that an investigation of blacklisting was called for. The EEOC's failure to investigate this aspect of Silver's complaint should not foreclose his access to a court hearing. To earn the right to sue, a Title VII complainant need only seek, in an appropriate manner, administrative relief. Failure to obtain relief at the administrative level is what prompts, rather than forecloses, the search for judicial relief.

Therefore, I would remand the case to the district court for a hearing on the blacklisting claims, which appear from the record to have been promptly filed with the EEOC. In addition, I would instruct the district court to reconsider, in light of our disposition on the blacklisting issue, whether there has been any assertion of a continuous pattern of discrimination that would work to save Silver's charge of discriminatory discharge despite what I view as his failure to make a timely filing with the EEOC as to the discharge complaint. *See Smith v. American President Lines, Ltd.*, 571 F.2d 102, 105-106 & nn. 5-6 (2d Cir. 1978).

of the limitations provision is "to ensure expedition in the filing and handling of those complaints." Not surprisingly, the scheme enacted by Congress effectuates these two different goals by imposing two different requirements on those who seek to invoke the remedial provisions of Title VII. Thus, a charge *must not* be filed with the EEOC until after the expiration of the mandatory deferral period (or termination of state proceedings), yet a charge *must* be filed with the EEOC within 300 days of an alleged unlawful employment practice. As a practical matter, a person who complains to the EEOC within 180 days of an alleged illegal employment practice can be sure of neither tripping on the deferral threshold nor bumping against the limitations ceiling. Regardless of whether the relevant state has created an agency to which deferral is necessary, and regardless of how long any such agency has been in existence, and regardless of how quickly any such deferral agency terminates its proceedings, the complaint will be timely.

The majority's refusal to read the statute as written interferes significantly with the congressional decision to require prompt action on the part of Title VII plaintiffs. The legislative history of the predecessor of § 706(e) makes clear that the section contains two different limitations periods not to reward persons in deferral states, but rather to ensure that they are not penalized for having to comply with the statute's deferral requirements.

As originally enacted in 1964, Title VII required extraordinary diligence on the part of complainants. The original limitations provision (then labelled section 706(d)), like present section 706(e), contained two different limitations periods. The statute provided for a basic 90 day filing period and a 210 day period --the latter to apply to cases where state procedures were followed. Looking at the legislative history of this original limitations section, in *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972), Justice (then Judge) Stevens concluded:

> The legislative history as a whole indicates a basic purpose to require the complainant to make his initial filing within 90 days; the extension of the period to 210 days in certain states was plainly intended to permit him to "exhaust" the state procedures. There is no suggestion that complainants in some states were to be allowed to proceed with less

> diligence than those in other states. [Selections from the legislative history] indicate that unless a complainant pursues his state remedies with sufficient diligence to permit the state, within 210 days, either to complete its action or to have 60 days in which to act without federal interference, he may not file a timely charge with the EEOC.

459 F.2d at 825 n.35. Before passage of the 1964 legislation, Senator Dirksen clearly explained the relationship of the proposed deferral section and the proposed limitations section:

> "New subsection (d) [now labelled (e)] requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in subsection (b) [now labelled (c)], he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. *The additional 120 days is to allow him to pursue his remedy by State or local proceedings."*

Id. quoting the EEOC's Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 3018 (emphasis added). The equally unambiguous remarks of Senator Humphrey make clear that the 210 day limitations period for deferral cases was intended to protect a complainant against losing the right to file with the EEOC "simply because the 90-day period for filing with the Federal Commission has elapsed while he seeks to pursue State remedies." *Id., quoting* Legislative History, *supra,* at 3006.

When Title VII was amended in 1972, both limitations periods were lengthened. New section 706(e) specifies a base period of 180 days and a period of 300 days applicable to complainants subject to the statute's deferral requirements. The differential between the two remained the same: an aggrieved individual in a deferral state still has an extra 120 days in which to file with the EEOC so that compliance with the deferral requirements of the act can be achieved. Thus the limitations section as amended still ensures that no penalty is exacted from those in deferral states. No more diligence is required of those complainants

than is required of their counterparts in states lacking deferral agencies.

Like the cases on which it relies, the majority opinion overlooks the legislative history which clearly establishes that the statute is to be applied as it reads. *See Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); and *Vigil v. American Telephone and Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972). The majority offers nothing to support the assumption, necessarily implicit in today's decision, that Congress intended to give complainants in deferral states a 120 day bonus and to excuse them from exercising roughly the same degree of diligence required of persons in non-deferral states. It should be noted that in 1975, the Eighth Circuit, sitting en banc, concluded that an examination of the legislative history excerpted above necessitated a rethinking of *Richard v. McDonnell Douglas Corp., supra,* which had attempted to interpret Title VII's filing requirements without reference to this history.

> [I]t would not be in keeping with the intent of Congress to allow one individual 300 days to file a charge because of the fortuitous circumstance that the state where the claim arose is a deferral state, when another individual in a non-deferral state will have only 180 days in which to file.
>
> The purpose underlying the extended period in a deferral state is to give the state agency an initial opportunity to process the claim without jeopardizing the federal right, not to extend by 120 days the time for assertion of this federal right.
>
> . . . .
>
> While we agree that "the statute leaves much to be desired in clarity and precision," . . . there is no doubt as to what the extended filing period in [§ 706(e)] was intended to accomplish. In the 1964 Act a complainant was given 90 days in which to file a charge of employment discrimination. However, due to the proviso in then [§ 706(b)] that the charge must first be made with a state or local agency if one exists, an additional 120 days was given to file a charge with the

EEOC to allow a complainant to pursue his state or local remedies without prejudicing his federal right.

The extended filing period was not intended as a bonus for complainants residing in a deferral state but as a means of effecting an accommodation between the federal right and the requirement of pre-amendment [§ 706(b)] of initial resort to an available state or local agency.

We are here concerned with amended Title VII. However, except for an enlargement of time for filing a charge from 90 to 180 days and concomitant extension of the deferral provision to 300 days, there were no substantive changes made in [§ 706(d)] (renumbered [§ 706(e)]).

Olson v. Rembrandt Printing Co., 511 F.2d 1228, 1231-33 (8th Cir. 1975) (footnote and citation omitted).

The only legislative history on which the majority relies is an excerpt from a report of the House-Senate Conference Committee on the 1972 amendments, which endorsed the decision of the Tenth Circuit in *Vigil.* However, the fact remains that in 1972 Congress chose to leave the design and wording of the limitations subsection intact; the only changes made were a renumbering of the section and the lengthening of the two limitations periods contained therein. In my view, since the intent of the enacting Congress is unambiguous and the amending Congress chose to retain the original scheme, the evidence is insufficient to permit the inference that the later Congress intended to accomplish wholly new ends by leaving intact the scheme constructed by an earlier Congress which had different purposes in mind. *See Oscar Mayer & Co. v. Evans,* 47 U.S.L.W. 4569, 4571-72 (U.S. May 21, 1979).

Finding little support in the language of the statute or in its legislative history, today's decision apparently rests on the widely accepted and reasonable principle that as a remedial statute often invoked by laypersons, Title VII should be interpreted flexibly so as to eliminate procedural barriers that serve no purpose. However this principle cannot be taken to authorize the judicial remodelling of all provisions of a remedial statute that place strict limitations on the access road to the newly-created remedy. For

example, in *Love v. Pullman Co., supra,* the Supreme Court made three crucial observations in approving the EEOC practice of (1) making referrals to state agencies on behalf of complainants in deferral states and (2) delaying formal filing of a charge until expiration of the deferral period or termination of state proceedings. First, the Court noted that the EEOC practice interfered with neither the policy of deferral to state procedures nor the goal of expedition in the handling of claims. Second, the Court noted that no legitimate interest of defendants was prejudiced. Finally, the Court noted that nothing in Title VII suggests that state proceedings may not be initiated by the EEOC acting on behalf of a complainant or that the EEOC may not delay the formal filing of a complaint until termination of state proceedings. It was these determinations that led the Court to conclude that requiring a second filing by a complainant "would serve no purpose other than the creation of an additional procedural technicality." 404 U.S. at 526 (footnote omitted).

The EEOC practice in the instant case does not meet these tests. First, permitting a charge to be filed with the EEOC at any time within 300 days regardless of whether the extra time has been used as intended, is to sacrifice the diligence Congress sought to require of Title VII complainants. Although the majority assures us that the interpretation adopted today "does not countenance the filing of stale claims," I respectfully suggest that when Congress bestows new rights and remedies on some persons and imposes new obligations and liabilities on others, its judgment regarding how and when claims are to be asserted and preserved ought not to be lightly disregarded. "Even though a statute of limitations may 'permit a rogue to escape,' the legislative commands must be respected." *Moore v. Sunbeam Corp., supra,* 459 F.2d at 826 n.37, *citing Toussie v. United States,* 397 U.S. 112, 123-24 (1970). Second, to the extent that the repose granted by Congress to potential defendants has been delayed, they have been adversely affected by the EEOC practice. Finally, the language of the statute indicates that the result reached today was simply not intended by the authors of Title VII. Deference to agency interpretation is appropriate only when consistent with deference to the intent of Congress.

Referring to the many "procedural requirements and time limitations that must be met before a claim of dis-

crimination can be brought to the attention of a federal court," and *citing Love v. Pullman, supra,* we have remarked:

> The procedures thus mandated exist not for their own sake, but rather in furtherance of substantive purposes . . . .[T]he rigid insistence on meticulous observance of technicalities *unrelated to any substantive purpose* is inappropriate.

Weise v. Syracuse University, 522 F.2d 397, 411, 412 (2d Cir. 1975) (citations omitted).[3] It must be remembered, however, that where, as here, a procedural requirement *does* further a substantive purpose, it is judicial disregard of the statutory design that is inappropriate.

---

3 It is interesting to note that the *Weise* Court apparently assumed, in dictum, that the deferral process was to be *completed* within 300 days:

> If the alleged unlawful employment practice occurs within a state or locality having a law prohibiting such a practice, an aggrieved person cannot file a charge with the EEOC until 60 days have elapsed after the commencement of such state or local proceedings . . . . Resort to the EEOC *thereafter* is conditioned on the filing of charges not more than 300 days after the occurrence of the alleged unlawful practice or 30 days after the termination of state or local proceedings, whichever is earlier.

Weise v. Syracuse University, 522 F.2d 397, 411 (2d Cir. 1975) (footnote and citation omitted) (emphasis added).

NEW YORK STATE: EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

COMPLAINANT

RALPH H. SILVER

VS. Case Nos.
IV-E-C-1581-76E

MOHASCO CORPORATION E-C-43805-76E

RESPONDENTS

DETERMINATION AND ORDER AFTER INVESTIGATION

On August 12, 1976, Ralph H. Silver, who is of the Jewish faith, filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of his creed, in violation of the Human Rights Law of the State of New York.

After investigation and following a review of related information and evidence with named parties, the Division of Human Rights has determined in the above-entitled complaint that there is no probable cause to believe that the respondent(s) engaged in or was (were) engaging in the unlawful discriminatory practice complained of.

This determination is based on the following: Complainant herein alleges that he was terminated from employment because of his creed. Respondent has officers and upper/middle management personnel of complainant's stated religious faith. It cannot be ascertained that complainant's employment was terminated for reasons other than management's judgment that his job performance was unsatisfactory.

This complaint is therefore ordered dismissed, and the file is closed.

THE COMPLAINANT OR ANY PARTY TO THE PROCEEDING BEFORE THE DIVISION MAY APPEAL THIS ORDER TO THE STATE HUMAN RIGHTS APPEAL BOARD, TWO WORLD TRADE CENTER, 82ND FLOOR, NEW YORK, NEW YORK 10047, BY FILING A NOTICE OF APPEAL WITHIN FIFTEEN (15) DAYS AFTER THE DATE OF THE SERVICE OF THIS ORDER.

DATED: Feb. 9, 1977
STATE DIVISION OF HUMAN RIGHTS

By /s/ John W. Walker, Jr.
John W. Walker, Jr.
Regional Director

TO: Ralph H. Silver, Complainant
211 Cresent Village
Clifton Park, New York 12065

Mohasco Corporation
Respondent
Richard H. Lange, Esq.
Attorney for Respondent
57 Lyon Street
Amsterdam, New York 12010

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

ORDER

RALPH H. SILVER,
COMPLAINANT-
APPELLANT

Case No. E-C-43805-76E

APPEAL NO. 4035

VS.

MOHASCO CORPORATION,

RESPONDENT

The above-entitled appeal having been filed with this Board on February 19, 1977 by Ralph H. Silver, complainant-appellant and the record having been requested on February 28, 1977 and submitted by the State Division of Human Rights on March 22, 1977 and the appeal having come on to be heard before Honorable Irma Vidal Santaella on the 16th day of November, 1977 and Ralph H. Silver, complainant-appellant having appeared in person and argued on his own behalf and respondent having appeared by Robert H. Lange, Esq., General Counsel, who submitted a Statement and Memorandum of Law, and by Bouck, Holloway & Kiernan, Esqs., Warner M. Bouck, Esq., who argued on behalf of respondent, and the State Division of Human Rights having appeared by Gladys M. Foster, Esq., Senior Attorney, who submitted on the record, and

The Board having reviewed the record herein and having considered the arguments of the parties, and Statement and Memorandum of Law on behalf of the respondent, and a majority of the Board having decided that the Determination and Order of the State Division of Human Rights dismissing the complaint of the complainant-appellant was not arbitrary, capricious or an abuse of discretion (Hon. T. Blum not participating), it is

ORDERED that the Determination and Order of the State Division of Human Rights made herein on February 9, 1977 be, and the same is hereby in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

By /s/ Irma Vidal Santaella
Irma Vidal Santaella, Chairman

Dated & Mailed: December 22, 1977

TO:

APPELLANT

Ralph H. Silver
211 Crescent Village
Clifton Park, N.Y. 12065

RESPONDENT

Mohasco Corporation
Richard H. Lange, Esq.
Attorney for Respondent
57 Lyon Street
Amsterdam, N.Y. 12010

Bouck, Holloway & Kiernan, Esqs.
107 Columbia Street
Albany, NY 12210
Attn: Warner M. Bouck, Esq.

DOHR

Commissioner Warner Kramarsky
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047

Ann T. Anderson, Esq., General Counsel
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1 WEST GENESEE STREET
BUFFALO, NEW YORK 14202
(716) 842-5170

Charge No. 023760777
(TBU6-0777)

Ralph H. Silver
211 Crescent Village
Clifton Park, New York 12065

Charging Party

Mohasco Corporation
37 Lyon Street
Amsterdam, New York 12010

Respondent

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19 (b)(d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the findings of the New York State Division of Human Rights, which are attached. Having examined the New York State Division of Human Rights' findings and the record presented, I conclude that there is not reasonable cause to believe the charge is true.

This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court within ninety (90) days of his receipt of this letter and by taking the other procedural steps set out in the enclosed NOTICE OF RIGHT TO SUE.

ON BEHALF OF THE COMMISSION:

8/24/77 /s/ Edwin C. Casler
DATE EDWIN C. CASLER, DISTRICT DIRECTOR

Enclosures: (2)
706 Agency Findings
Notice of Right to Sue

APPENDIX B

Statutes Involved

Section 706(c) of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(c), reads as follows:

> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Section 706(e) of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5(e), reads as follows:

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice

with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Supreme Court, U. S.
FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. 79-616

MOHASCO CORPORATION,

Petitioner,

vs.

RALPH H. SILVER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petition For Certiorari Filed October 15, 1979

Certiorari Granted December 10, 1979

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. 79-616

MOHASCO CORPORATION,

Petitioner,

vs.

RALPH H. SILVER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INDEX TO APPENDIX.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the United States District Court for the Northern District of New York

Date	Nr.	Proceedings
1977		
Nov. 23	(1)	Filed Complaint - Issued summons-orig. & 6 copies.
Nov. 28		Delivered Summons-orig. & 6 copies to the Marshal for service.
Dec. 22	(5)	Filed summons served 12/9/77 on Edward Curren, James Cullen; Raymond Greenhill through Sonja Greenhill, wife; on Frederick Woller through Alicia Woller, wife; served 12/7/77 on Mohasco Corp. through Allan Brown, Counsel; served 12/15/77 on Herbert Brown through Arlene Brown, wife; served 12/9/77 on Mohasco Corp. through Allan Brown, Atty.
Dec. 29	(6)	Filed Answer by defendant Mohasco Corp. & proof of service.
1978		
Feb. 14	(11)	Filed Motion for Summary Judgment returnable March 6, 1978 at Albany, Memorandum in Support, Affidavit of Richard H. Lange with exhibits and Notice of Motion.
June 2	(20)	Filed Affidavit of Margrethe R. Powers in Opposition and affidavit of service by mail.

Date	Nr.	Proceedings
1978		
Oct. 19	(22)	Filed Memorandum-Decision and Order of Judge Foley (10/17/78) granting motion to dismiss by defendants Curren, Greenhill, Woller, Brown and Cullen and granting Mohasco Corporation's motion for summary judgment. Therefore the complaint is dismissed in its entirety.
Oct. 19	(23)	Filed Judgment and mailed cards re: Judgment to Powers and Ghandi, Esqs., Richard H. Lange, Esq. and Bouck, Holloway and Kiernan, Esqs.
Nov. 1	(25)	Filed Notice of Appeal by plaintiff.

Ralph H. Silver
211 Crescent Village
Clifton Park, N.Y. 12065
June 10, 1976

Buffalo District Office
Equal Employment Opportunity Commission
One West Genesee
Room 1020
Buffalo, NY 14202

[EEOC's date stamp omitted in printing]

Dear Sirs:

I learned from Mrs. Lyn Miller today that I have only 300 days in which to file a claim. Since I was terminated from Mohasco Corporation, Amsterdam, N.Y., on August 29, 1975, I desire to file a claim with this letter.

Stated simply and succinctly, I was both hired and fired because of my religion. The fact is, I was the third Jewish economist hired by Mohasco to fill a single position within a three year period. The first was Ron Woodward. The second, Dick Kahn.

Why was this so? I too was suspicious when I learned this right at the start of my employment. It did not mean anything to me. I had worked for the second largest management consulting firm in the world, the second largest economic consulting firm in the country. I had a graduate degree from Columbia University and I had never been discriminated against. I thought it could never happen to me.

Last month a personal friend who is also a high Mohasco executive finally "leveled" with me. He told me that Mohasco created the economist position to give token compliance with job anti-discrimination legislation because enforcement was becoming increasingly more active with each passing year. The plan to create a "minority" slot(s) on the executive level was the idea of Frederick Woller, former Director Management Manpower, who now devotes full time to personnel special projects. Because of his close association with Edward Curren, vice president Corporate Planning, it was decided that the slot(s) would

be set up in Mr. Curren's area of command. Because many retailers in the home furnishings industry with which Mohasco deals are Jewish, this would be the least undesirable minority with which to fill the economist slot. I was told that after I left it was recognized that three Jewish economists in a row was pushing it too far and so some attempt was made to hire a female economist. Hadn't I noticed that one never saw a black or Spanish speaking employee at the corporate headquarters even though Amsterdam has a relatively large Spanish speaking population?

There are numerous supporting facts which keep surfacing and which made no sense to me until a few weeks ago. For example, during one of the initial interviews I was asked, Where were your parents born? And, of course, up until termination, 3:00 P.M. on a Friday afternoon, I had received no hint that my work was anything but good. My performance appraisal which was first due after nine months and then on July 15th, the one year period, was postponed although I requested a sit-down. But because I worked hard, between 60 and 90 hours a week, sleeping many nights at the home of Charles Ferris in Amsterdam so that I could remain at the office until 10:00 P.M. and because important papers were removed from my files by my superior, Raymond Greenhill, personnel attempted to soften the injustice of my termination by allowing me to refer reference inquiries directly to them. I was also permitted to tell prospective employers that I had resigned.

Although I had been a donkey for the year I served as senior marketing economist in not knowing the primary qualification for having been hired or that it would not be long, despite the high quality of my work and my loyalty to the company, before I would be put out of the door, others around me, I now learn, were well aware of what was happening. It is only after learning the facts from a friend that I now call upon your agency to ask for your help.

On a mathematical basis the probability for randomly selecting three economists who are each of the Jewish faith is so low that to my mind chance played no part in

Mohasco personnel policy. I believe that this fact alone warrants an investigation of a policy which turned out to be a rather cruel and humiliating experience for me. I have never before been the subject of a practical joke which lasted for over a year.

The many supporting facts, memoranda, etc., which I have for you are lengthy and requires some considerable explanation. For this reason I would like to meet with a member of your office. I understand that there is an investigator who periodically visits my area. If for some reason this raises problems, I will travel to Buffalo. You can count on my full cooperation and honesty.

An investigation of Mohasco personnel policies, I believe, will show them to be of the nineteenth century and in violation not only of the law, but of fundamental human decency.

This then is my rough, incomplete and hastily drafted complaint.

Very truly yours,

/s/ Ralph H. Silver

Ralph H. Silver

[Case Control Unit Date Stamp Omitted in Printing]

Date 6-15-76

EEOC Charge No. TBU6-0777

WMS Code

Case Control Unit-EEOC Section
State of New York
To: Division of Human Rights
270 Broadway
New York, New York 10007

Mr. Ralph H. Silver
211 Crescent Village
Clifton Park, NY 12065
vs.
Mohasco Corp.

SUBJECT: NOTICE OF DEFERRAL TRANSMITTAL

Transmitted hereby is EEOC Form 5, Charge of Employment Discrimination or other official written material identified above. This charge is being deferred to your agency pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended. The Commission will automatically file this charge at the expiration of the deferral period, unless we are notified before the expiration of that period that your agency has terminated its proceedings. The charging party has been notified of this deferral.

Please complete and return the bottom portion of this form to advise us whether you intend to process the charge. If you accept it for processing, EEOC will refrain from processing until a final disposition is made by your agency.

Name of District Director	Signature
EDWIN C. CASLER	/s/ Edwin C. Casler

RE: Ralph H. Silver vs.
Mohasco Corp.

To Whom it may Concern:

This will acknowledge receipt of the referenced charge. This agency

☐ Will process this charge. Please refrain from processing until we have reached a final disposition.

☐ Will not process this charge because_____

Date _____

EEOC Charge No. TBU 6-0777

706 Agency
Charge No. 7978

WMS Code _____

To: Equal Employment Opportunity Commission
1 Genesee Street, Room 320
Buffalo, NY 14202

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1 West Genesee Street
Buffalo, New York 14202
(716) 842-5170

[EEOC's seal omitted in printing]

June 16, 1976

Ralph H. Silver
211 Crescent Village
Clifton Park, New York 12065

RE: TBU6-0777

Dear Mr. Silver:

We have received your charge that you have been discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended.

If you have not done so already, you should file your charge with the New York State Division of Human Rights.

The enclosed papers inform you of your rights and Equal Employment Opportunity Commission procedures. If you have any further questions, please write or call us.

Sincerely,

EDWIN C. CASLER
District Director

Enclosures

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
Two World Trade Center
New York, New York 10047

[Division of Human Rights' Seal omitted in printing]

June 18, 1976

Mr. Ralph H. Silver
211 Crescent Village
Clifton, N.Y. 12065

Re: Your charge against

Mohasco Corp.

EEOC Charge No. TBU6-0777

Dear Mr. Silver,

A copy of your charge or letter to the Equal Employment Opportunity Commission has been referred to our attention, in accordance with the provisions of the Civil Rights Act of 1964.

The New York State Human Rights Law confers jurisdiction upon this Division to receive and pass upon complaints alleging discrimination in employment because of age, race, creed, color, national origin, disability, sex, or marital status. However, the Equal Employment Opportunity Commission lacks jurisdiction in the areas of age, disability and marital status.

I am referring your correspondence to the attention of the following person and office:

Mr. John W. Walker, Jr. Regional Director
217 Lark St., Albany, N.Y. 12210
Tel: 518 474-2705

You are invited to visit this or any other regional office of the Division to file a complaint. Our offices are open Monday through Friday from 9:00 A.M. to 5:00 P.M. Please bring this letter with you and give it to the person with whom you speak.

It is requested that you file a complaint with this Division within 30 days.

Very truly yours,

/s/ Hilda Matos

Hilda Matos
Case Control Unit-EEOC Section

State of New York: Executive Department

State Division of Human Rights on the complaint of

RALPH H. SILVER, Complainant,

- against -

MOHASCO CORPORATION, Respondent(s).

Complaint No. IV-E-C-1581-76E

EEOC Charge No. TBU6-0777

I, Ralph H. Silver, residing at 211 Cresent Village, Clifton Park, NY 12055. Tel. No. 371-5447. charge the above-named respondent(s) whose address(es) is(are) 57 Lyon Street, Amsterdam, N.Y. 12010 (841-2211) with an unlawful discriminatory practice relating to Employment, (fill in field of jurisdiction) in violation of Article 15 of the Executive Law of the State of New York on or about August 29, 1975 because of Age ( ), Race ( ), Creed (X), Color ( ), National Origin ( ), Sex( ), Disability ( ), Marital Status ( ), Retaliation ( ).

The particulars are:

I. I began employment with respondent as an Economist on 7/15/74.

II. On information and belief, I was the third Economist of the Jewish faith to be hired by respondent in approximately three years.

III. Further on information and belief the position of Economist, and hiring Jews for the position, was created by respondent to give "token" compliance with anti-discrimination legislation and Affirmative Action.

IV. I feel that my performance in the position was satisfactory. I had no adverse criticism of my work until the time of my termination.

V. I was terminated from employment on August 29, 1975.

VI. I am of the Jewish faith. Based on the above I charge respondent with terminating me from employment because of my creed, in violation of the Human Rights Law of the State of New York.

I have not commenced any other civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

I also charge the above-named respondent(s) with violating Title VII Civil Rights Act 1964, as amended (covers race, color, religion, sex, national origin relating to employment) and hereby authorize SDHR to accept this verified complaint on behalf of EEOC subject to the statutory limitations contained in Title VII.

..... Signature

State of New York)
County of Albany) ss:

..Ralph H. Silver ..... ,being duly sworn, deposes and says: that he is the complainant herein, that he has read (or had read to him) the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated on information and belief; and that as to those matters, he believes the same to be true.

...../s/ Ralph H. Silver.....
(Signature of Complainant)

Subscribed and sworn to before me
this 12th say of August, 1976.

/s/ Helen M. Cox

Helen M. Cox
Notary Public, State of New York
No. 0786500
Qualified in Albany County
Term Expires March 30, 1977.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1 West Genesee Street
Buffalo, New York 14202
(716) 842-5170

[EEOC's seal omitted in printing]

August 20, 1976

Ralph Silver
211 Crescent Village
Clifton Park, New York 12065

In reply refer to: TBU6-0777

Pursuant to the requirements of federal law, a notice is being sent to the person or persons you have charged with discrimination informing them of the charge you filed with this office. The purpose of this notice is to insure that no records will be destroyed that concern your case.

As explained in a letter sent to you earlier, the Buffalo District Office will not consider your charge until after the New York State Division of Human Rights' proceedings are completed.

Sincerely yours,

Edwin C. Casler
District Director

Note: If your address changes, complete the information below and promptly mail to us.

Effective _____ my address changes to:

_____
(Street Address) (City & State) (Telephone)

Charge No. TBU6-0777

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BUFFALO DISTRICT OFFICE
One W. Genesee Street - Room 1020
Buffalo, New York 14202

To:
President
Mohasco Corp.
57 Lyon St.
Amsterdam, NY 12010

Person Filing Charge Ralph H. Silver	
This Person (Check one)	
X	Claims to be Aggrieved
	Is filing on behalf of a person claiming to be aggrieved
	Is a commissioner of EEOC
Date of Alleged Violation August 29, 1975	
Place of Alleged Violation Amsterdam, NY	
Charge Number TBU6-0777	

Notice of Charge of Employment Discrimination

(See Notice of Non-retaliation on reverse)

You are hereby notified that a charge of employment discrimination under Section 706 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000c-5, as amended, has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is provided herein.

No action on your part is necessary at this time. However, if you wish to submit any information in writing, it will be made a part of the file and will be considered at the time we investigate this charge. Telephone communications cannot be made a part of the record. Section 1602.14 of the Commission's Regulations (See attachment) requires the preservation of all personnel records relevant to this charge, as described below, until it is resolved.

Because of the Commission's volume of pending work, we are unable to tell you when we can schedule investigation of this charge; we will however, contact you at the earliest possible date.

BASIS OF DISCRIMINATION ☐ Race or Color ☐ Sex ☒ Religion ☐ National Origin							
NATURE OF CHARGE							
	Hiring	X	Discharge		Layoff		Recall
	Wages		Promotion		Demotion		Seniority
	Job Classification		Training/ Apprenticeship		Exclusion		Union Representation
	Segregated Locals		Referral		Qualification/ Testing		Advertising
	Benefits		Segregated Facilities		Intimidation/ Reprisal		Reprisal (USC 704(a) Only)
	Terms and Conditions		Unspecified and Other		Other (Specify)		
I hereby certify that I mailed the original of this Notice to the addressee herein above.							
Date 8/20/76	EEOC Employee (Signature) Edwin C. Casler, Dist. Director						

[Reverse side omitted in printing]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NOTICE OF RIGHT TO SUE

To:
Ralph H. Silver
211 Crescent Village
Clifton Park, New York 12065

From:

U.S. Equal Employment Opportunity Commission
Buffalo District Office
One West Genesee Street, Room 320
Buffalo, New York 14202

EEOC Representative

Edwin C. Casler, District Director

Telephone Number	Case/Charge Number
(716) 842-5170	023760777 (TBU6-0777)

This notice is issued for the following reason:

☐ Upon your request
☒ No reasonable cause
☐ Untimely charge
☐ No jurisdiction
☐ Failure to proceed

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. **IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.**

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

You have a right to inspect and to copy information contained in the Commission's case file for use in a public court proceeding if you decide to sue. If you want to inspect this material, need help in filing your case in court, or have any questions about your legal rights, contact the EEOC representative named above.

An information copy of this Notice has been sent to the respondent(s) named in this case.

8/24/77	/s/ Edwin C. Casler
(Date)	(Authorized EEOC Official)
	District Director

cc:

To: (Respondent)
Mohasco Corporation

Supreme Court, U. S.
FILED
NOV 14 1979
MICHAEL RODAK, JR. CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-616

MOHASCO CORPORATION,

Petitioner,

vs.

RALPH H. SILVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JONATHAN I. BLACKMAN
One State Street Plaza
New York, New York 10004

Counsel for Respondent

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-616

MOHASCO CORPORATION,

Petitioner,

vs.

RALPH H. SILVER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A23-44) is reported at 602 F.2d 1083. The opinion of the district court (Pet. App. A1-21) is not officially reported.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a conflict exists among the courts of appeals of sufficient seriousness to warrant this Court's further review on the issue of whether the provision of Section 706(c) of Title VII of the Civil Rights Act of 1964[1] requiring up to 60 days' deferral to a state fair employment

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1 42 U.S.C §2000e-5(c) (1970 ed., Supp. V) (hereafter "Section 706(c)")

practices agency prior to the processing of a charge of employment discrimination by the Equal Employment Opportunity Commission should be construed as affecting the time periods contained in Section 706(e) of Title VII[2] for timely filing charges of employment discrimination with the Equal Employment Opportunity Commission.

2. Whether a conflict exists among the courts of appeals as to whether the sequence in which a pro se complainant files charges of employment discrimination as between the Equal Employment Opportunity Commission and a state fair employment practices agency affects the period in which the filing with the Equal Employment Opportunity Commission will be deemed timely.

3. Whether there is any conflict among the courts of appeals concerning the rule that the permissible scope of a Title VII complaint in a district court is determined by the matters that could reasonably be expected to grow out of an investigation by the Equal Employment Opportunity Commission of the complainant's charge.

COUNTERSTATEMENT OF THE CASE

Respondent Ralph H. Silver ("Silver") was hired as a senior marketing economist by petitioner Mohasco Corporation ("Mohasco") on July 15, 1974. During his thirteen months of employment by Mohasco, Silver, who is Jewish, felt himself to be the object of harassment and abuse by Mohasco's executives because of his religion, culminating in his religiously motivated discharge by Mohasco on August 29, 1975. Following his discharge, Silver began to suspect that Mohasco was disseminating false references concerning his allegedly unsatisfactory work to prospective employers, including advising such employers that Silver was Jewish, with the result that he has been unable to obtain other

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2 42 U.S.C §2000e-5(e) (1970 ed., Supp. V) (hereafter "Section 706(e)")

employment.

On June 15, 1976, 291 days after his discharge, Silver filed a charge of employment discrimination with the District Office of the Equal Employment Opportunity Commission ("EEOC") in Buffalo, New York, after having been informed on June 10, apparently by an EEOC employee, that a 300-day limitation on the filing of such charges existed. The charge, in the form of a letter to the EEOC, alleged that Silver had been "both hired and fired because of my religion". The charge also alluded to the question of references, noting that Mohasco's personnel department had agreed to mitigate the impact of Silver's dismissal by allowing him to refer reference inquiries directly to the personnel department and to tell prospective employers that he had resigned. After requesting an opportunity to meet with someone from the EEOC to explain "[t]he many supporting facts, momoranda [sic], etc., which I have for you", the charge concluded with the statement, "this, then, is my rough, incomplete and hastily drafted complaint."

Upon receiving Silver's charge, the EEOC, on the same day, following its normal procedure, transmitted a copy of the charge to the State of New York Division of Human Rights ("NYSDHR"), in order to comply with Section 706(c) of Title VII, which mandates deferral by the EEOC to the applicable state fair employment practices agency if one exists. On June 18, 1976, the NYSDHR notified Silver that it had received his charge from the EEOC and requested that he file a formal complaint, which he did on August 12, 1976. In the meantime, the EEOC had notified Silver on June 16, 1976 of its deferral to the NYSDHR.

Section 706(c)'s deferral period, measured from the date of mailing of Silver's charge to the NYSDHR by the EEOC, expired on August 13, 1976. The EEOC then commenced its processing of the charge by sending a Notice of Charge to Mohasco on August 20, 1976. The EEOC took no further action, however, notifying Silver on the same day

that it did not plan to consider the charge until after the NYSDHR's proceedings had been completed.

Following his initial June 15, 1976 letter to the EEOC, Silver attempted on several occasions to develop further the issue of references to prospective employers to which he had first adverted in the June 15 charge. On August 31, 1976, he sent the NYSDHR's field representative a letter alleging in great detail that he was being "black listed" by Mohasco through the circulation of bad references, and forwarded a copy of this letter to the District Director of the EEOC. On December 19, 1976, he sent another letter to the NYSDHR representative, repeating his charge of blacklisting, in which he stated "I have requested three times, this makes the fourth, that my complaint be amended to include blacklisting".

Despite these charges of continuing blacklisting through negative references, neither the NYSDHR nor later the EEOC considered or investigated this aspect of Silver's claims. On February 9, 1977, the NYSDHR issued its determination, finding no probable cause to believe that Silver had been terminated on account of his religion, but not discussing the question of post-termination references. This determination was affirmed by the State Human Rights Appeal Board. On August 24, 1977, the EEOC, apparently without independent investigation, issued a similar "no reasonable cause" determination, relying upon the findings and record prepared by the NYSDHR and giving substantial weight to those findings. The EEOC thereupon notified Silver of his right to sue in the district court, and on November 23, 1977, within 90 days of receiving his right-to-sue letter, Silver commenced a civil action. His pro se complaint alleged that Mohasco had both discharged him on religious grounds in violation of Title VII and had further violated Title VII on a continuing basis by giving out bad references to prospective employers with the same discriminatory intent.

The district court granted summary judgment for Mohasco. Without reaching the merits, the district court held that Silver's June 15, 1976 charge was not timely filed with the EEOC, depriving the court of jurisdiction over Silver's subsequent Title VII suit based upon the allegations in the charge. In reaching this conclusion, the district court acknowledged that the time limitation applicable to the filing of Silver's charge was the 300-day period provided by Section 706(e) for charges filed in "deferral states" such as New York, which have their own fair employment practices laws and agencies such as the NYSDHR charged with the enforcement of such laws. (Pet. App. A9). However, the district court then read the provision of Section 706(c) requiring 60 days' deferral by the EEOC to the appropriate state fair employment practices agency (the so-called "706 agency") prior to EEOC processing of a charge to operate as an implied reduction in the 300-day period afforded by Section 706(e) to only 240 days when no filing with the state agency has been made prior to filing with the EEOC. Because Section 706(c) provides that "no charge may be filed" prior to expiration of the 60-day deferral period, the district court concluded that when a charge is "filed" first with the EEOC and then referred by the EEOC to a state 706 agency, the initial EEOC filing must occur by the 240th day after the incident of discrimination in order to be timely. (Pet. App. A6-19). The district court also held that the allegations of continuing post-termination discrimination contained in the complaint, revolving around Mohasco's practice of supplying prospective employers with bad references concerning Silver, should be dismissed for failure to charge such discrimination before the EEOC. (Pet. App. A19-20).

The court of appeals reversed on both issues. On the question of timeliness, the court of appeals, in a 2-1 decision, refused to construe the "no charge may be filed" language of Section 706(c) as impinging upon or modifying the express time periods for filing EEOC

charges set forth in Section 706(e). 602 F.2d 1086-1090. The majority of the court of appeals also rejected Mohasco's alternative argument that a complainant's charge must be initially filed with the state 706 agency (as opposed to being first filed with the EEOC and then referred by the EEOC to the state 706 agency) in order to make applicable Section 706(e)'s longer 300-day limitations period for filing charges when proceedings have been "initially instituted" with the State agency. 602 F.2d 1088, n.14. On the question of adequacy of Silver's EEOC charge to support the "blacklisting" allegations of his judicial complaint, the court of appeals unanimously held that the scope of the EEOC investigation that could reasonably be expected to grow out of the discrimination charged would embrace the "blacklisting" allegations, particularly since Silver had explicitly notified both the EEOC and the NYSDHR of these allegations only 11 days after the EEOC commenced processing his initial "rough, incomplete and hastily drafted" charge. 602 F.2d 1090-1091, 1091 n.2.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE ISSUE OF TIMELINESS OF SUFFICIENT SIGNIFICANCE TO WARRANT THIS COURT'S REVIEW OF THE DECISION BELOW, WHICH IS FULLY CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

1. Petitioner Mohasco relies principally upon a conflict among the courts of appeals to justify this Court's review of the Second Circuit's decision that the phrase "no charge may be filed" in Section 706(c) should not be read as implicitly modifying Section 706(e)'s express 300-day time limit on filing charges with the EEOC. It cannot be denied that while the Tenth Circuit, the Sixth Circuit, and the Eighth Circuit are in agreement with the approach taken by the Second Circuit in this case, the Seventh Circuit has taken a contrary position. Compare Vigil v. American Telephone & Telegraph Co., 455 F.2d 1222 (10th Cir. 1972); Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723 (6th Cir. 1972); Richard v. McDonnell Douglas Corp., 469 F.2d 1249 (8th Cir. 1972) with Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972). However, the authority of Moore v. Sunbeam Corp., Mohasco's sole authority for the argument that the sixty-day deferral period of Section 706(c) operates as a limitation on the filing periods of Section 706(e), has been seriously undermined by subsequent developments.

First of all, the legislative history made when Title VII was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, gives unmistakable evidence that Congress agreed with the interpretation given to the phrase "no charge may be filed" in Section 706(c) by the Tenth Circuit in Vigil v. American Telephone & Telegraph Co., supra, and followed by the Second Circuit in the instant case. In the bill initially passed by the Senate, S. 2515, Section 706(c) was amended to replace the language "no charge may be filed" with the phrase "the Commission shall take no action with respect to the investigation of such charge before the expiration of sixty days after proceedings have been commenced under ... State or local law." 118 Cong. Rec. 290 (1972). The elimination of the phrase "no charge shall be filed [prior to the end of the deferral period]" was intended to make it clear that a charge could be filed with the EEOC prior to deferral in accordance with this Court's holding in Love v. Pullman Co., 404 U.S. 522 (1972). 118 Cong. Rec. 4941 (1972) (Section-by-Section Analysis). Most significantly, the House-Senate Conference Committee felt that the change made by the Senate bill in the existing statutory language was unnecessary. As stated in the Conference Report:

> Sections 706(c) and (d) - These subsections, dealing with deferral to appropriate State and local equal employment opportunity agencies, are identical to sections 706(b) and (c) of the Civil Rights Act of 1964. No change in these provisions was deemed necessary in view of the recent Supreme Court decision of Love v. Pullman Co., _____ U.S. _____, 92 S. Ct. 616 (1972) which approved the present EEOC deferral procedures as fully

> in compliance with the intent of the Act. That case held that the EEOC may receive and defer a charge to a State agency on behalf of a complainant and begin to process the charge in the EEOC upon lapse of the 60-day deferral period, even though the language provides that no charge can be filed under section 706(a) [now Section 706(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. Similarly, the recent circuit court decision in Vigil v. AT&T, _____ F.2d _____, 4 FEP cases 345 (10th Cir. 1972), which provided that in order to protect the aggrieved person's right to file with the EEOC within the time periods specified in section 706(c) and (d) [i.e., present Section 706(e)], a charge filed with a State or local agency may also be filed with the EEOC during the 60-day deferral period, is within the intent of this Act. (emphasis supplied) 118 Cong. Rec. 7564 (1972) (Section-by-Section Analysis).

Thus, the Conference Committee, in reporting on the bill that was eventually passed without further change by both Houses, expressly approved Vigil v. American Telephone & Telegraph Co. and concurred in Vigil's holding that the language "no charge may be filed" appearing in Section 706(c) does not prevent filing during the deferral period in order to satisfy the time requirements of Section 706(e).

This legislative history was cited to the Seventh Circuit in Moore v. Sunbeam Corp. on petition for rehearing but was rejected by that court on the ground that it was not relevant to construction of the pre-1972 statute, 459 F.2d at 830. This objection is not applicable to the instant action which involves construction of the statute as amended in 1972.[3] Congressional approval of Vigil strongly undercuts the continued vitality of Moore.

This Court's subsequent decision in Oscar Mayer & Co. v. Evans, ___ U.S. ____, 99 S. Ct. 2066 (1979), casts further question upon the correctness of the decision in Moore v. Sunbeam Corp. In Oscar

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3 This Court has noted in another context that the Section-by-Section Analysis of the Conference Report on the 1972 amendments provides "the final and conclusive confirmation of the meaning" of Title VII. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 365 (1977)

Mayer, the Court construed §14(b) of the Age Discrimination in Employment Act of 1967 ("ADEA"), which it characterized as "patterned after and . . . virtually in haec verba with §706(b) of Title VII, 42 U.S.C. §2000e-5(c)." ___ U.S. at ___, 99 S. Ct. at 2071. The Court emphasized the distinction between the ADEA counterpart of Section 706(c), which insures the substantive purpose of allowing the state or local 706 agency to have the first opportunity of resolving complaints of employment discrimination, and the ADEA counterparts of Section 706(e), which functions as a limitation on state claims. In holding that an age discrimination plaintiff's failure to file a charge with the applicable state fair employment practices agency within the state's statute of limitations for filing such charges cannot deprive such a plaintiff of his federal remedy, the Court stated:

> The ADEA's limitations periods are set forth in explicit terms in 29 U.S.C. §§626(d) and (e) [the counterparts to Section 706(e) of Title VII], not 14(b), 29 U.S.C. §§633(b) [the counterpart "virtually in haec verba" to the deferral provision of Section 706(c) of Title VII]. Sections 626(d) and (e) adequately protect defendants against stale claims. We will not attribute to Congress an intent through §14(b) to add to these explicit requirements by implication and to incorporate by reference into the ADEA the various state-age discrimination statutes of limitations. ___ U.S. at ____, 99 S. Ct. at 2074-2075 (emphasis supplied).

This Court's refusal in Oscar Mayer to "add to these explicit requirements [of the ADEA's counterparts of Section 706(e)] by implication" suggests powerfully that the Court in Moore misread Title VII when it modified the explicit limitations period of Section 706(e) by implying from the deferral provision of Section 706(c) a sixty-day reduction in that period.

Finally, as the court of appeals noted below, the EEOC has consistently maintained that a charge is "filed" for purposes of Section 706(e)'s limitation period on the day that the EEOC receives it, in accordance with the holdings of Vigil, Anderson and Richard and the decision of the Second Circuit in the instant case. 1083 F.2d at 1090. Only months

ago this Court reaffirmed its long-standing doctrine that the interpretation of the statute by the EEOC, as the agency charged with administering Title VII, is "entitled to great deference." Oscar Mayer & Co. v. Evans, ___ U.S. at _____, 99 S. Ct. at 2074 (1979), quoting Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

The doubt that these later developments casts upon the continuing authority of Moore v. Sunbeam Corp. makes the conflict among the circuits relied upon by petitioner more apparent than real. While the cases are certainly not in perfect harmony, the relatively minor discord introduced by Moore v. Sunbeam Corp. does not justify this Court's discretionary review.

2. As a second string to its bow, Mohasco urges that this Court should review the Second Circuit's decision because of an asserted conflict among the circuits on the issue of whether a Title VII complainant must file his charge before the appropriate state 706 agency first in order to be able to take advantage of Section 706(e)'s longer 300-day limitation period, rather than filing first with the EEOC and relying on the EEOC to refer his charge to the appropriate state agency. There is in fact no decision of a court of appeals which supports Mohasco's argument that the order of filing as between the EEOC and the state agency should determine which limitation period governs, much less a conflict among the circuits on this issue.

Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975) (en banc), which Mohasco extensively discusses, does not support the proposition that the order of filing as between the EEOC and the state 706 agency should control the applicability of the 300-day period, but rather holds that where the state limitations period is less than 180 days, a complainant must file his charge before the state agency within

180 days in order to preserve his federal right. 511 F.2d at 1232.[4] Nor does even the dictum in Olson that a state charge must be filed within 180 days regardless of the state statute of limitations, 511 F.2d 1233, support the position that the order of filing determines the length of the federal limitation period. The Second Circuit's holding that the 300-day period of Section 706(e) is available when a charge is referred by the EEOC to a state agency for initial action, as well as when a charge is filed in the first instance with the state agency, thus raises no conflict with any other appellate decision.

3. The Second Circuit's decision on the timeliness issue is in any case fully consistent with this Court's prior decisions. Love v. Pullman Co., 404 U.S. 522 (1972), holds that proceedings before the applicable state 706 agency need not be initiated by the complainant himself at all, but can be initiated by the EEOC through the EEOC's referral of a charge previously filed with it to the state agency. Love's refusal to read the "no charge may be filed" language of Section 706(c) literally so as to require a second EEOC "filing" following the completion of the 60-day deferral period forecloses the appeal to the literal that Mohasco makes, particularly since the Love court expressly recognized the differing purposes of Section 706(c) and Section 706(e) in holding that the EEOC's referral procedure satisfied both provisions of Title VII. 404 U.S. at 526. The clear teaching of Love, especially in light of the Court's later discussion in Oscar Mayer & Co. v. Evans, ___ U.S. ___, 99 S. Ct. 2066 (1979), is that as long as there is an opportunity for the state agency to act on a charge of employment discrimination (thus satisfying the substantive goal of the deferral mechanism of Title

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4 Its holding is thus inapplicable to the instant case, in which Silver's charge was referred to the NYSDHR well within New York's one-year statute of limitations on employment discrimination complaints. N.Y. Executive Law §297(5) (McKinney 1972).

VII), neither the sequence of filing as between the EEOC and the state 706 agency nor the timing of filing with the state agency is of legal significance as respects the timeliness of a plaintiff's federal filing.[5]

II. THE COURT OF APPEALS' DECISION ON THE ISSUE OF "BLACKLISTING" INVOLVED THE APPLICATION OF UNDISPUTED LAW TO THE PARTICULAR FACTS PRESENTED BY THIS CASE, AND DOES NOT MERIT DISCRETIONARY REVIEW BY THIS COURT.

In reversing the district court's dismissal of Silver's "blacklisting" charges because such charges were not detailed within the four corners of his original letter to the EEOC, the court of appeals applied well-settled law governing the relationship between the contents of an EEOC charge and a complaint in a later district court civil action. As petitioner itself admits (Petition, p. 21), the applicable legal standard is well settled in the courts of appeals: the proper scope of a Title VII complaint is determined by the scope of the EEOC investigation that could reasonably be expected to grow out of the charge of discrimination filed with the EEOC. See, e.g., EEOC v. Bailey Co., Inc., 563 F.2d 439, 446 (6th Cir. 1977), cert. denied, 435 U.S. 915 (1978); Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398-399 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977); Tipler v. E.I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). The court of appeals' unanimous decision that Silver's June 15, 1976 letter to the EEOC, as supplemented or amended by his later submissions, sufficiently charged "blacklisting" to make such allegations properly includible in Silver's judicial complaint, is fully supported by the record and raises no substantial legal issue warranting this Court's review.

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5 Indeed, in an opinion that does not directly discuss the point, this Court has already refuted Mohasco's second contention that the order of filing as between EEOC and state agency controls the application of Section 706(e)'s 300-day period. See Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 359 n.8 ("If a charge has been initially filed with or referred to a state or local agency, it must be filed with the EEOC within 300 days after the practice occurred. . . .") (emphasis supplied). This contention has been directly considered and rejected in Doski v. M. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976); Trim v. Restaurant Marketing Associates, Inc., 20 EPD ¶30,052 (N.D. Cal. 1979); Jacobs v. Board of Regents, 473 F. Supp. 663, 667 (S.D. Fla. 1979); Din v. Long Island Lighting Co., 463 F. Supp. 654 (E.D.N.Y. 1979) and Lo Re v. Chase Manhattan Corp., 431 F. Supp. 189, 195-196 (S.D.N.Y. 1977), among other cases. Cf. Ortega v. Construction and General Laborers' Union, No. 390, 396 F. Supp. 976, 982 (D. Conn. 1975).

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit in this case be denied in all respects.

Respectfully submitted,

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Supreme Court, U.S.
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BRIEF FOR PETITIONER MOHASCO CORPORATION

OPINIONS BELOW.

The Opinion of the District Court for the Northern District of New York of October 17, 1978, granting Mohasco Corporation's (hereinafter "Mohasco") Motion for Summary Judgment, is reported unofficially at 19 FEP Cases 677 and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A1 - A22). The Opinion of the Court of Appeals of July 18, 1979, reversing the trial court, is officially reported at 602 F.2d 1083 and unofficially reported at 20 FEP Cases 464 and 20 CCH EPD ¶30, 137, and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert. Pet. App. A23 - A44).

JURISDICTION.

The opinion by a divided panel of the Court of Appeals was entered on July 18, 1979 (Cert. Pet. App. A23 - A44). The Court granted the writ of certiorari on December 10, 1979. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED.

This case involves the interpretation and application of the provisions of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter referred to as "Title VII"), specifically Title VII § 706 (c), 42 U.S.C. § 2000e-5(c) and Title VII § 706(e), 42 U.S.C. § 2000e-5(e) (hereinafter referred to as "§ 706(c)" and "§ 706(e)" respectively).

The relevant portion of § 706(c) reads as follows:

> "In the case of an alleged unlawful employment practice occurring in a State. . .which has a State. . .law prohibiting the unlawful employment practice alleged and establishing or authorizing a State. . .authority to grant or seek relief from such practice. . ., no charge may be *filed* under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State. . .law, unless such proceedings have been earlier terminated. . . ."
>
> (Emphasis added.)

The relevant portion of § 706(e) reads as follows:

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . ., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State. . . agency with authority to grant or seek relief from such practice. . ., such charge *shall be filed* by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State. . .agency has terminated the proceedings under the State. . .law, whichever is earlier. . . ."
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> (Emphasis added.)

These statutory provisions are set forth in full in Appendix B to the Petition for a Writ of Certiorari (Cert. Pet. App. A51 - A52).

QUESTIONS PRESENTED.

(1) Whether the Court of Appeals for the Second Circuit erred in holding that, in enacting Title VII, Congress intended the word "filed" to have different meanings in §§ 706(c) and (e), so that a charge is "filed" on receipt by the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") for purposes of calculating the § 706(e) limitations period, but "filed" only after the expiration of the period of deferral to the State agency for § 706(c) purposes;

or

(2) If the Second Circuit did not err in so holding, whether it erred in further holding that the charging party may take advantage of the extended 300-day limitations period (granted by § 706(e) to a charging party who has "initially instituted" state proceedings) in spite of the fact that (a) neither state nor federal proceedings were instituted within 180 days of the alleged discriminatory act, and (b) the initial "filing" with the EEOC preceded the institution of proceedings before the State agency.

STATEMENT OF THE CASE.

Respondent Ralph H. Silver (hereinafter "Silver") was employed by Mohasco on July 15, 1974. His employment relationship with Mohasco was terminated on August 29, 1975. Silver submitted a letter to the EEOC, which is shown to have been received by the EEOC on June 15, 1976, 291 days after Silver's termination. This letter alleged that Silver ". . .was both hired and fired because of [his] religion", and specifically detailed an alleged plan pursuant to which he claimed Mohasco had created the position to which he was hired as a ". . .['minority slot'] to give token compliance with job anti-discrimination legislation. . . ." (App. A3.)

Because the New York State Division of Human Rights (hereinafter "Human Rights Division") is (and was at that time) a "706 Agency" under the EEOC's regulations, 29 C.F.R. § 1601.12(k) (1973), the EEOC forwarded Silver's letter to the Human Rights Division by Notice of Deferral Transmittal dated June 15, 1976. In apparent recognition of the unambiguous language of § 706(c) that ". . .no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. . .", the EEOC's Notice of Deferral included a statement that:

> "This charge is being deferred to your agency pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended. The Commission *will automatically file* this charge at the end of the deferral period, unless we are notified before the expiration of that period that your agency has terminated its proceedings."
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> (App. A7; emphasis added.)

The Human Rights Division, by letter to Silver dated June 18, 1976, advised Silver of its receipt of his letter to the EEOC, and stated that:

> "You are invited to visit this or any other regional office of the Division to file a complaint."

and that:

> "It is requested that you file a complaint with this Division within 30 days."
>
> (App. A12.)

On August 12, 1976, 55 days later and 349 days after the termination of his employment with Mohasco, Silver filed a verified complaint with the Human Rights Division alleging essentially the same claim of employment discrimination because of his religious faith as had been raised in his letter to the EEOC. (App. A13 - A14.)

Sixty-six days after the EEOC mailed its "Notice of Deferral Transmittal" to the Human Rights Division, the EEOC, by Notice of Charge of Employment Discrimination dated August 20, 1976, notified Mohasco that Silver had filed a charge against Mohasco alleging employment discrimination under Title VII. (App. A17 - A18.) *See* 29 C.F.R. § 1601.13 (1972) (respondent to be served by EEOC with copy of charge within 10 days of filing) and § 1601.12(b)(1)(iv) (1975) (60 day deferral period to commence upon EEOC mailing of charge to 706 Agency). By a form letter of the same date over the signature of Edwin C. Casler, the Regional Director, the EEOC notified Silver that the EEOC had sent such Notice to Mohasco. (App. A15.)

On February 9, 1977, the Human Rights Division issued its determination that there was no probable cause to believe Mohasco had engaged in the unlawful discriminatory practice complained of by Silver. (Cert. Pet. App. A45 - A46.) This determination was upheld by Order of the New York State Human Rights Appeal Board on December 22, 1977. (Cert. Pet. App. A47 - A48.)

On August 24, 1977, the EEOC, over Mohasco's jurisdictional objection that Silver had failed to file a timely charge with the EEOC, issued its "no reasonable cause" determination. (Cert. Pet. App. A49 - A50.)

On the same day, the EEOC mailed to Silver notification of his right to commence a civil action within ninety days of his receipt of such notice. (App. A19 - A20.) Ninety-one days later, on November 23, 1977, Silver commenced this action by filing a complaint in the United States District Court for the Northern District of New York, citing Title VII as the sole basis for this action.

By Memorandum-Decision and Order dated October 17, 1978, the Honorable James T. Foley, of the United States District Court for the Northern District of New York, granted Mohasco's motion for summary judgment on the grounds that Silver failed to make a timely filing of his charge with the EEOC, and that the court therefore lacked subject matter jurisdiction with respect to Silver's claims against Mohasco. (Cert. Pet. App. A1 - A22.)

On appeal, a divided Second Circuit, on July 18, 1979, reversed the decision of the district court and held Silver's charge was timely filed with the EEOC. In this respect, Chief Judge Kaufman, writing for the majority, stated:[1]

> "We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is 'filed' for purposes of § 706(e) when received, and 'filed' as required by § 706(c) when the state deferral period ends."
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> (Cert. Pet. App. A29.)

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1 Chief Judge Kaufman was joined in his opinion by Judge Oakes. Judge Meskill filed a separate opinion dissenting from this portion of the Second Circuit's decision.

SUMMARY OF ARGUMENT.

The plain language of § 706(c) provides that in a state that has created a 706 Agency, no charge may be "filed" with the EEOC until 60 days (or, if the 706 Agency has been in existence less than one year, 120 days) after state proceedings have been commenced, unless such state proceedings have been earlier terminated. At the same time, § 706(e) unambiguously provides that a charge must be "filed" with the EEOC within 180 days of the alleged unlawful discriminatory practice, unless the aggrieved person has *initially instituted* state proceedings, in which case the charge must be "filed" with the EEOC within 300 days of the alleged unlawful discriminatory practice.

The legislative history indicates Congress specifically intended to require diligence on the part of a complainant, and further intended that a complainant initially seek redress from the state agency, if there was one. To accomplish these two goals, Congress: (1) established a deferral period during which no charge may be "filed" with the EEOC to provide the state agency with a meaningful opportunity to investigate and resolve the problem without federal interference; and (2) established a short 180-day limitations period for filing with the EEOC that is extended to 300 days only if the complainant has "initially instituted" state proceedings, to prevent a complainant from losing his federal right because he chose first to pursue his state remedies.

Thus, in keeping with these statutory provisions, the legislative history, and the prior decisions of this Court, when an aggrieved person in a deferral state submits a charge to the EEOC, the EEOC may not "file" that charge until the deferral period has run.

This Court has held that the EEOC may hold such a charge in "suspended animation" to be automatically "filed" upon the expiration of the deferral period. Whether the EEOC charge is timely for purposes of § 706(e) is controlled by the date the charge is "filed", not by the date the EEOC receives it. In this case, because the Human Rights Division proceedings did not terminate earlier, the earliest date the deferral period could have ended is August 14, 1976, 60 days after the EEOC mailed

Silver's charge-letter to the Human Rights Division, and 351 days after Silver's termination. Since the longest limitations period provided by § 706(e) is 300 days, Silver's charge-letter was untimely when the EEOC "filed" it on the day after the deferral period expired, 352 days after Silver's termination. In effect, Silver's charge died while in "suspended animation."

The Second Circuit below, however, held that notwithstanding the plain language of the statute, the EEOC may nonetheless "file" a charge on receipt for purposes of measuring the limitations provisions contained in § 706(e). Even assuming, *arguendo,* that this conclusion is correct, the Second Circuit erred because it did not give effect to the provision in § 706(e) extending the basic 180-day limitations period to 300 days only when ". . .the person aggrieved has initially instituted proceedings with a State. . .agency. . . ." The words "initially instituted", as used in § 706(e), are susceptible of only two interpretations. First, the language could require that, to be entitled to the 300-day period within which to file a charge with the EEOC, the person aggrieved must "initially institute" state proceedings within the shorter 180-day period; the effect of this construction is to require an aggrieved person to file *somewhere* within 180 days in order to file a timely charge with the EEOC. Alternatively, the words "initially instituted" could refer to the sequence in which the charges are filed. Under this interpretation, if, as the Second Circuit held, a charge is "filed" by the EEOC on receipt, the aggrieved person will have only 180 days to file a charge with the EEOC unless he or she *first* files a charge with the state agency. Under either of these interpretations, Silver's charge was untimely.

ARGUMENT.

The crucial issue presented by this case is whether Silver's charge-letter was timely filed with the EEOC. The resolution of this issue requires this Court to determine: (1) whether Silver's charge-letter was "filed" when the EEOC received it on June 15, 1976, 291 days after Silver's termination, or whether that charge was merely "submitted" to the EEOC, held in "suspended animation" for 60 days, and then "filed" on August 15, 1976, 352 days after Silver's termination; and (2) whether, on whatever date the charge was "filed", it was timely.

I. Pursuant To The Statutory Scheme Enacted By Congress, The EEOC May "File" A Charge Only After The Expiration Of The Deferral Period.

In this case, there is no dispute over when the statutory limitations period began--the parties agree the limitations period began to run on August 29, 1975, the date of Silver's termination. Rather, the dispute in this case involves the date the limitations period ended.

A. The Deferral Procedure Previously Approved By This Court, And Actually Followed By The EEOC In This Case, Considers A Charge To Be "Filed" By The EEOC After The Deferral Period Has Expired, Not On Receipt.

Section 706(c) provides in pertinent part that:

> ". . .no charge may be *filed* under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State. . .law. . . ."
>
> (Emphasis added.)

Section 706(e) provides in pertinent part that:

> ". . .in the case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State. . . agency. . .such charge *shall be filed* by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . . ."
>
> (Emphasis added.)

Thus, the unambiguous language of § 706(c) clearly precluded the EEOC from "filing" Silver's charge-letter on June 15, 1976, the date the EEOC received that letter, because the statutory period of deferral to the state agency had not yet passed.

In apparent recognition of this statutory provision, the EEOC mailed the Human Rights Division a Notice of Deferral Transmittal dated June 15, 1976 in which it advised the Human Rights Division that:

> "The Commission will automatically file this charge at the expiration of the deferral period, unless we are notified before the expiration of that period that your agency has terminated its proceedings."
>
> (App. 7.)

This referral procedure was expressly approved by this Court in *Love v. Pullman Company*, 404 U.S. 522 (1972). In *Love,* the plaintiff submitted a "letter of inquiry" complaining of alleged discrimination to the EEOC prior to instituting state proceedings. The EEOC treated this letter as a complaint, but *did not formally file it.* Instead, the EEOC orally notified the 706 Agency that it had received a complaint from the plaintiff. By letter to the EEOC, the 706 Agency waived the opportunity to process the plaintiff's charge. The EEOC then investigated the complaint and issued a finding of reasonable cause, but was unable to obtain the defendant's voluntary compliance. This Court gave express approval to the procedure the EEOC followed in this case, saying:

> "We hold that the filing procedure followed here fully complied with the intent of the Act, and we thus reverse the judgment of the Court of Appeals. Nothing in the Act suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself, nor is there any requirement that the complaint to the state agency be made in writing rather than by oral referral. Further, we cannot agree with the respondent's claim that the EEOC may not properly hold a complaint in 'suspended animation,' automatically *filing it upon termination of the state proceedings.*"
>
> *(Love, supra,* 404 U.S. 525-26; emphasis added and footnotes omitted.)

It is important to note that in *Love* this Court did not hold the EEOC could treat the plaintiff's charge as "filed" on receipt for § 706(c) purposes, but instead implicitly rejected such treatment. The defendant in *Love* argued that the EEOC's holding the plaintiff's charge in abeyance pending state agency proceedings was a nullity because the EEOC was required to view charges as being filed with the EEOC when they were received. In rejecting that contention, this Court held:

> ". . .the statutory prohibition of 706(b) [now §706(c)] against filing charges that have not been referred to a state or local authority necessarily creates an exception to the regulation requiring filing on receipt."
>
> *(Love, supra,* 404 U.S. at 526, note 5.)

Thus, pursuant to the referral procedure approved by this Court in *Love,* the EEOC was required to consider Silver's charge as "filed" only after the expiration of the deferral period mandated by § 706(c). That the EEOC actually treated the charge in this manner is demonstrated by the fact the EEOC first notified Mohasco that Silver had filed a charge by Notice of Charge of Employment Discrimination dated August 20, 1976--66 days after the EEOC received Silver's charge-letter. (App. A17 - A18.) *See* 29 C.F.R. § 1601.13 (1972) (respondent to be served by EEOC with copy of charge within 10 days of filing).

The decision of the Second Circuit below, however, interpreted Title VII as establishing two "filing" dates: the EEOC charge is "filed" on receipt for purposes of calculating § 706(e)'s limitations period, and "filed" again upon the expiration of § 706(c)'s deferral period. In reaching this conclusion, the Second Circuit concededly eschewed both the literal meaning of § 706(c) (in favor of what it viewed to be the "fundamental policies embodied in Title VII" (Cert. Pet. App. A28 - A29)) and the above-quoted portions of the *Love* decision (in favor of what it viewed to be the "clear import" of that decision (Cert. Pet. App. A31, n. 13)).

It is submitted that it is incongruous to interpret the word "filed" to mean two different things within two subsections of the same statutory provision, and that the Second Circuit reached this result in an attempt to aid complainants at the expense of the clear statutory language and the rights of defendants in Title VII actions.

B. Although A Division Of Opinion Exists Between The Circuit Courts Of Appeal On The Issue Of When A Charge Is "Filed" With The EEOC, The Better Opinions Hold § § 706(c) and (e) Establish But One "Filing" Date.

Five circuits have considered the precise timeliness question presented by this case. One circuit has rendered a decision diametrically opposed to the view expressed by the court below. *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972) (Stevens, J.). The other three circuits have issued decisions that support the result rendered in the decision below. *See Vigil v. American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972); and *Richard v. McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972). However, the Eighth Circuit, sitting *en banc*, has since rendered an opinion sharply retreating from its position in *Richard, supra. Olson v. Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975).[2] These decisions cannot be reconciled, but the opinions that best accord with the statutory language and the prior decisions of this Court are those that hold the word "filed" means precisely the same thing in § 706(c) as in § 706(e).

The Tenth Circuit, in *Vigil, supra*, 455 F.2d at 1224-25 held that: (1) the submission of a complaint to the EEOC during the deferral period provided by § 706(b)

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2 Similarly, in an extremely recent opinion, *Geromette v. General Motors*, 21 FEP Cases 649 (6th Cir. 1979), the Sixth Circuit specifically adopted the holding in *Olson, supra.* Curiously, although the court noted that tolling even on equitable grounds has been "very much restricted", the *Geromette* opinion does not refer to the Sixth Circuit's earlier decision in *Anderson.*

[now § 706(c)] fulfilled the requirement of § 706(d) [now § 706(e)] that a charge be "filed" within 210 [now 300] days of the date of the unfair employment practice complained of, even though the EEOC could not proceed with its investigation until after the 706 Agency had had the complaint for 60 days; and (2) in any event, the submission "tolled" the running of the 210 day limitations period.

The Sixth and Eighth Circuits, when confronted with similar situations, followed *Vigil*, but *only* with respect to *Vigil*'s holding that the submission of a charge to the EEOC before deferral to the 706 Agency "tolled" the running of the 210 day filing period then prescribed by § 706(d) [now § 706(e)]. *Anderson, supra,* 464 F.2d at 725 ("Submission of the original charge tolled the 210 day time limit."); *Richard, supra,* 469 F.2d at 1251 (". . . initial receipt of the original charges by the EEOC serves to toll the statute of limitations.").

However, an *en banc* Eighth Circuit, in *Olson, supra,* 511 F.2d at 1231-33, has since significantly limited its decision in *Richard,* stating:

> ". . .[I]t would not be in keeping with the intent of Congress to allow one individual 300 days to file a charge because of the fortuitous circumstance that the state where the claim arose is a deferral state, when another individual in a non-deferral state will have only 180 days in which to file. The purpose underlying the extended period in a deferral state is to give the state agency an initial opportunity to process the claim without jeopardizing the federal right, not to extend by 120 days the time for assertion of this federal right.
>
> . . .
>
> "Thus a charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferral state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal Act."

The Seventh Circuit, in an opinion written by then-Judge Stevens, and closely tracked by the district court in the instant case (although specifically rejected by the majority in the Second Circuit decision below), has held that a charge originally submitted to the EEOC and referred to a 706 Agency need not be resubmitted, but may be held by the EEOC in "suspended animation" for the duration of the deferral period to be automatically "filed" with the EEOC after the expiration of that period. *Moore, supra,* 459 F.2d at 826. The *Moore* court specifically rejected the *Vigil* rationale. First, the Seventh Circuit rejected *Vigil*'s holding that the EEOC could treat the charge as "filed" when received for § 706(e) purposes, but could defer processing the charge until the 706 Agency had the opportunity to act required by § 706(c). *Moore* reasoned this holding in *Vigil* was inconsistent with the language and structure of Title VII as a whole, the legislative history and the Supreme Court's decision in *Love, supra.* Next, *Moore* rejected *Vigil*'s rationale that the submission of a charge to the EEOC "tolled" the extended limitations period, holding:

> "In our view the statute provides a basic limitations period of 90 [now 180] days, which may be extended (or 'tolled') to a maximum of 210 [now 300] days. We do not think that Congress intended a further extension (or a second 'tolling') to achieve the same purpose (time for state consideration) as the original enlargement of the 90-day period to 210 days in those states which have a Fair Employment Practices Agency. If Congress had so intended, we believe it would have included such a provision instead of the 210-day limitation. Moreover, the difficult questions of statutory construction will seldom arise if the complainant's original filing is within the basic 90-day period. Although we may share the EEOC's view that less diligence should have been required, we must respect the legislature's choice of the appropriate period of limitations, whether that choice was made to effectuate the policies of the Act or as an element of a compromise that enabled it to pass."
>
> *(Moore, supra,* 459 F.2d at 429-30.)

These views contrast with the holding of the majority of the court below that there are two "filing" dates:

> "Confronted with [the provisions of §§ 706(c) and (e)], the able district court judge read § 706(c) literally. He reasoned that even when a charge is received by the EEOC well within 300 days of the alleged discrimination, it cannot be considered 'filed' with that office until sixty days after referral to the state agency. Thus, according to Judge Foley, Silver's charge, albeit received by the EEOC 291 days after his discharge, was not 'filed' before August 14, 1976, 352 days subsequent to the termination of his employment. Accordingly, Judge Foley determined that Silver was barred by the 300-day jurisdictional prerequisite of § 706(e).
>
> "The district court decision would, therefore, require a Title VII complainant to file his charge with the state agency within 240 days of discharge or forfeit the opportunity to bring his complaint before the EEOC. We are of the view, however, that an informed reading of Title VII, consistent with its purpose, requires us to conclude that a charge is 'filed' for purposes of § 706(e) when received, and 'filed' as required by § 706(c) when the state deferral period ends."
>
> (Cert. Pet. App. A28 - A29; footnote omitted.)

To summarize then, there are at least two, and possibly three, separate views of the requirements of §§ 706(c) and (e) that have received specific judicial sanction from Courts of Appeals.

First, the Second Circuit (in the case below), the Tenth *(Vigil, supra),* and, at one time, the Sixth *(Anderson, supra)* and Eighth *(Richard, supra)* Circuits have held that, in a deferral state, if a charge is received by the EEOC within 300 days of the alleged unlawful employment practice, that charge is timely if 706 Agency proceedings are thereafter timely instituted, whether or not such state proceedings are instituted within § 706(e)'s 300-day limitations period.

Second, there is the view adopted by the Seventh Circuit in *Moore,* the district court below, and Judge Meskill in dissent from the Second Circuit opinion below, that the requirements of § § 706(c) and (e) must be read literally, and that there is but one "filing" date. Section 706(c) provides that, in a deferral state, a charge *may not be* "filed" with the EEOC until after the expiration of the mandatory deferral period, while at the same time § 706(e) requires that the charge in such a case *must be* "filed" within 300 days of the alleged unlawful employment practice. Thus, a charge submitted to the EEOC is not automatically "filed" on receipt, but is held in "suspended animation" until the deferral period expires, and then is "filed". The timeliness of such a charge is governed by this "filing" date.

Finally, there is the view now espoused by the Eighth Circuit in *Olson,* (and recently adopted by the Sixth Circuit in *Geromette, supra)* that, to be timely, a charge must be "filed" with the EEOC, or, in a deferral state, with a 706 Agency, within 180 days of the alleged unlawful employment practice. It should be noted that *Olson* is not at all inconsistent with the holdings of *Moore,* so that *Olson* and *Moore* may in fact express but one view, rather than two.

1. This Court Has Implicitly Rejected The Foundation Of The Cases That Held The Mere Submission Of A Charge To The EEOC Before Deferral "Tolls" The Running Of § 706(e)'s Limitations Period.

As noted in greater detail above, *Anderson* and *Richard* held only that the submission of a charge to the EEOC before deferral to the 706 Agency "tolls" the running of the extended filing period provided by § 706(e), and *Vigil* utilized this "tolling" argument as an alternative ground for its decision. *Moore,* however, rejected this "tolling" argument as clearly contrary to the statute.

In its decision below, the Second Circuit specifically avoided adopting the "tolling" argument, stating:

> "We do not reach the question, decided affirmatively by [the Sixth, Eighth and Tenth] circuits, whether initial receipt of the charge by the EEOC 'tolls' the § 706(e) statute of limitations. Rather, we interpret § 706(c) in a manner consistent with the result reached in *Vigil, Anderson,* and *Richard.* Moreover, we note that the Tenth Circuit employed our statutory construction as an alternative ground in *Vigil, supra,* 455 F.2d at 1224."
>
> (Cert. Pet. App. A32, n. 15.)

It is proposed the Second Circuit wished to avoid the "tolling" argument because of this Court's decision in *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976) (Rehnquist, J.).

In *Electrical Workers,* a Title VII plaintiff contended that the limitations period of § 706(d) [now § 706(e)] had been tolled by his initiation of a grievance proceeding pursuant to a collective bargaining agreement. In rejecting that contention, this Court stated that:

> ". . .Congress has already spoken with respect to what it considers acceptable delay when it established a 90- [now 180-] day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. *In defining Title VII's jurisdictional prerequisites 'with precision,'* [citations omitted], *Congress did not leave to courts the decision as to which delays might or might not be 'slight'."*
>
> *(Electrical Workers, supra,* 429 U.S. at 240; emphasis added.)

In commenting upon the extended limitations period of § 706(d) [now § 706(e)] where a claim of discrimination is commenced before a 706 Agency, this Court stated that:

> "Where Congress has spoken with respect to a claim much more closely related to the Title VII claim than is the contractual claim pursued under the grievance procedure, and *then firmly limited the maximum possible extension of the*

limitations period applicable thereto, we think that all of petitioner's arguments taken together simply do not carry sufficient weight to overcome the negative implications from the language used by Congress [citation omitted]."

(Electrical Workers, supra, 429 U.S. at 240; emphasis added.)

Thus, this Court has severely limited the application of the "tolling" rationale, which was essential to the *Anderson* and *Richard* decisions and which was one of the alternative bases for the *Vigil* decision, and has strongly suggested that rationale is inapplicable to the facts presented in this case.

The Second Circuit apparently recognized this, for it quite properly avoided using "tolling" as a basis for holding Silver's charge-letter to have been timely filed. Curiously, the Second Circuit nonetheless viewed *Anderson* and *Richard* as supporting its conclusion that a charge is "filed" by the EEOC on receipt, although the Second Circuit acknowledged that the "tolling" argument was the sole basis for those decisions. (Cert. Pet. App. A32, n. 15.) Apparently, the support the Second Circuit drew from these opinions was a similarity in result, not in rationale. In light of *Electrical Workers'* implicit rejection of the foundation of the *Anderson* and *Richard* decisions, it is submitted that those cases are no longer viable precedents.

2. The Clear Language Of § 706(c) Permits The EEOC To Consider A Charge To Be "Filed" Only After The Expiration Of The Statutory Deferral Period, As Recognized By The EEOC When It Promulgated The Procedural Regulations That Were Effective When Silver Submitted His Charge-Letter.

Confronted with the facts of this case, the Second Circuit held a charge is "filed" for purposes of § 706(e) when received, and "filed" for purposes of § 706(c) when the deferral period ends.

The Second Circuit admitted this construction is not in keeping with the literal language of the statute. (Cert. Pet. App. A28 - A29.) In nevertheless reaching its conclusion, the Second Circuit draws on the services of the EEOC's current regulations, 29 C.F.R. Part 1601 (1978). (Cert. Pet. App. A34.) However, a different procedural regulation was effective when Silver submitted his charge-letter to the EEOC on June 15, 1976. That regulation, 29 C.F.R. § 1601.12(b)(1) (1975), 40 F.R. 3210N, provided:

> "(b) The following procedures shall be followed with respect to cases arising in the jurisdiction of '706 Agencies' to which the Commission defers as further defined in paragraph (c) of this section.
> "(1) Any document, whether or not verified, received by the Commission as provided in § 1601.7, which may constitute a charge cognizable under Title VII, shall be deferred to the appropriate 706 Agency, as further defined in paragraph (c) of this section, as provided in the procedures set forth below:
> "(i) All such documents shall be dated and time stamped upon receipt.
> "(ii) A copy of the original document shall be transmitted by registered mail, return requested, to the appropriate State or local agency, or, where the State or local agency has consented thereto, by certified mail, by regular mail or by hand delivery.
> "(iii) The aggrieved party and any person filing a charge on behalf of an aggrieved party shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the State or local agency pursuant to the provisions of section 706(c), and that unless the Commission is notified to the contrary, *on the termination of State or local proceedings, or after 60 (or, where appropriate, 120) days have passed, whichever occurs first, the Commission will consider the charge to be filed with the Commission and commence processing the case.* Where the State or local agency terminates its proceedings within sixty (60) (or, where appropriate, 120)

days without notification to the Commission of such action the Commission will consider the charge to be filed with the Commission on the date the person making the charge was notified of the termination.

"(iv) The 60-day (or, where appropriate, 120-day) period shall be deemed to have commenced at the time such document is mailed or delivered to the State or local authority. Upon notification of the termination of State or local proceedings or the expiration of 60 (or 120) days, whichever occurs first, the Commission will consider the charge to be filed with the Commission and will commence processing the case.

. . ."

(Emphasis supplied.)

It is interesting to note that this regulation, promulgated three years after Congress passed the 1972 amendments to Title VII, clearly recognizes that § 706(c) precludes the EEOC from filing on receipt a charge originating in a deferral state. Rather, the regulation states the EEOC will consider the charge to be "filed" on the expiration of the deferral period.

In order to prevent charges like Silver's from being untimely, § 1601.12(b)(1)(v)(A) of these regulations further provided:

> "In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. . . ."
>
> (29 C.F.R. § 1601.12(b)(1)(v)(A) (1975), 40 F.R. 3210N; emphasis in the original.)

The district court below (Cert. Pet. App. A14 - A15, A18 - A19) struck down this section of the regulations, however, as an obvious and unauthorized attempt to circumvent the provisions of § § 706(c) and (e) by permitting the aggrieved person's charge to be "filed" on the 300th day after the date of the alleged unlawful discriminatory practice, irrespective of how long the charge had then been deferred. The Seventh Circuit, in *Moore, supra,* 459 F.2d at 824-25, struck down an analagous regulatory predecessor, 29 C.F.R. § 1601.12(b)(v) (1971), for the same reason. Silver (and the EEOC as *amicus* in the case below) implicitly conceded the correctness of these holdings by abandoning any argument based on these regulations that Silver's charge was timely.

More recently, the EEOC promulgated the regulations cited by the Second Circuit in support of its conclusion that the EEOC "files" charges arising in deferral states twice. These new regulations attempt to avoid the clear statutory provisions in a less flagrant manner. The current regulations purport to permit the EEOC to consider a charge to be "filed" for § 706(e) purposes on receipt, but prohibit the EEOC from processing that charge until the deferral period has expired. *See* 29 C.F.R. § 1601.12(b)(1)(v)(A) (1977). To the extent these current regulations, promulgated long after the final disposition of Silver's charge by the EEOC, may be proposed *ex post facto* to support the timeliness of Silver's charge, Mohasco submits they are contrary to the plain meaning of the statute, as well as inapplicable to the facts of this case.

What is most interesting about the 1971 and 1975 regulations is how clearly they demonstrate the EEOC has always fully comprehended that § 706(c) prohibits a charge from being "filed" until after the deferral period had expired. In spite of this, the EEOC has attempted to avoid the clear requirements of this statutory provision -- flagrantly in the early regulations; more subtly in later regulations.

Despite the fact that the regulations promulgated by the EEOC in 1971 and 1975 expressly *prohibited* the EEOC from "filing" a charge on receipt, and the fact that

the current regulations *require* the EEOC to "file" a charge on receipt, the Second Circuit believed the EEOC's assertion that the "filing" procedure embodied in the current regulations is consistent with the earlier "filing" procedure, finding:

> "The EEOC has consistently maintained that a charge is 'filed' on the day it is received by the federal agency, without regard to the intervening deferral period. . . ."
>
> (Cert. Pet. App. A34.)

In view of the explicit statements in the regulations, this finding of consistent EEOC practice is clearly erroneous.

C. Application Of The Statutory Provisions To The Facts Of This Case Requires A Holding That Silver's Charge-Letter Was "Filed" After The Expiration Of § 706(c)'s Deferral Period, And Well Beyond Any Limitations Period Provided by § 706(e).

This Court should hold the Second Circuit erred in refusing to apply the statute literally to Silver's charge. The statute, as written, clearly requires a holding that Silver's charge was not timely filed. As established by *Love* and *Moore,* the EEOC may hold a submitted charge arising in a deferral state in "suspended animation", and "file" it after the expiration of the § 706(c) deferral period. *Moore*'s further holding, that the § 706(e) limitations period should be governed by the date of such "filing", certainly makes more sense than the contrary holding reached in *Vigil* and by a majority of the Second Circuit panel below, that a charge is "filed" for § 706(e) purposes when received, but "filed" for § 706(c) purposes only after the expiration of the deferral period.

Judge Meskill in dissent from the Second Circuit's opinion below, authored what is perhaps the clearest explanation of the complementary purposes and functions of § § 706(c) and (e):

> "Despite the much-emphasized complexity of Title VII, there is no dispute over the literal meaning of the two statutory provisions under examination. Section 706(c), the deferral provision, provides that in a state that has created an agency to hear employment discrimination claims (a 'deferral state'), no charge may be filed with the EEOC until 60 days or 120 days (depending on how long the state agency has been in existence) after state proceedings have been commenced, unless such state proceedings have been earlier terminated. Section 706(e), the limitations provision, provides that charges must be filed with the EEOC within 180 days of the alleged unlawful employment practice, except that where an aggrieved party has *initially instituted* state proceedings, a charge must be filed with the EEOC within 300 days of the alleged unlawful practice. [Emphasis added.]
>
> "The purposes behind these provisions are every bit as clear as their literal meanings. In *Love v. Pullman Co.,* 404 U.S. 522, 526 (1972), a unanimous Supreme Court explicitly stated that the purpose of Title VII's deferral provision is 'to give state agencies a prior opportunity to consider discrimination complaints' while the purpose of the limitations provision is 'to ensure expedition in the filing and handling of those complaints.' Not surprisingly, the scheme enacted by Congress effectuates these two different goals by imposing two different requirements on those who seek to invoke the remedial provisions of Title VII. Thus, a charge *must not* be filed with the EEOC until after the expiration of the mandatory deferral period (or termination of state proceedings), yet a charge *must* be filed with the EEOC within 300 days of an alleged unlawful employment practice. As a practical matter, a person who complains to the EEOC within 180 days of an alleged illegal employment practice can be sure of neither tripping on the deferral threshold nor bumping against the limitations ceiling. Regardless of whether the relevant state

> has created an agency to which deferral is necessary, and regardless of how long any such agency has been in existence, and regardless of how quickly any such deferral agency terminates its proceedings, the complaint will be timely."
>
> (Cert. Pet. App. A38 - A39.)

This logical analysis, which results in but a single filing date, is easily applied to the facts of this case. Silver "submitted" his charge-letter to the EEOC 291 days after the termination of his employment with Mohasco. The EEOC referred Silver's charge to the Human Rights Division the same day. Section 706(c) prohibited the EEOC from filing Silver's charge until 60 days after the Human Rights Law proceedings were commenced by Silver. Assuming the EEOC's referral "commenced" proceedings under state law for purposes of § 706(c), *cf. Oscar Mayer & Co. v. Evans,* ___ U.S. ___, 60 L.Ed.2d 609, 618-19 (1979), the earliest possible date the EEOC could have "filed" Silver's charge-letter was on August 15, 1976, the day after the 60 day deferral period expired, which was 352 days after the termination of Silver's employment with Mohasco. Because that date is well beyond the 300-day limitations period provided by § 706(e), Silver's charge was not timely filed.

II. Even If, Notwithstanding The Express Language Of The Statute, The EEOC Properly "Filed" Silver's Charge On Receipt, That Charge Was Not Timely Because Silver Did Not "Initially Institute" State Proceedings So As To Be Entitled To The 300-Day Limitations Period.

Even if this Court approves the Second Circuit's holding that the EEOC "filed" Silver's charge on receipt for purposes of the § 706(e) limitations period, Mohasco submits that charge was nonetheless untimely because Silver did not "initially institute" state proceedings and, therefore, was not entitled to the extended 300-day filing period.

The Second Circuit below approved an interpretation of § 706(e) that considers any charge arising in a deferral

state to be timely filed if it is received by the EEOC within 300 days after the date of the alleged discrimination, whether or not proceedings before the 706 Agency have already been commenced. This interpretation ignores the provision of § 706(e) that a charge must be filed with the EEOC within 180 days after the alleged unlawful employment practice *except* ". . .in the case of an unlawful employment practice with respect to which *the person aggrieved has initially instituted* proceedings with a State or local agency. . .", in which case the charge must be filed with the EEOC within 300 days after the alleged unlawful employment practice occurred, or within 30 days after receiving notice that the 706 Agency has terminated the proceedings under the State or local law, whichever is earlier. This provision is susceptible of only two interpretations that give effect to the "initially instituted" language, and Silver's charge was untimely under either interpretation.

First, the phrase "initially instituted" could mean that the extended 300-day filing period is available only if the aggrieved person "initially instituted" state proceedings *within* the shorter 180-day filing period. This is the basis of the Eighth Circuit's *en banc* decision in *Olson,* where the court held:

> "While we agree that 'the statute leaves much to be desired in clarity and precision,' *Cunningham v. Litton Industries,* 413 F.2d 887, 889 (9th Cir. 1969), there is no doubt as to what the extended filing period in § 2000e-5(e) was intended to accomplish. In the 1964 Act a complainant was given 90 days in which to file a charge of employment discrimination. However, due to the proviso in then § 2000e-5(b) that the charge must first be made with a state or local agency if one exists, an additional 120 days was given to file a charge with the EEOC to allow a complainant to pursue his state or local remedies without prejudicing his federal right.
>
> "The extended filing period was not intended as a bonus for complainants residing in a deferral state but as a means of effecting an accommodation between the federal right and the requirement

of pre-amendment § 2000e-5(b) of initial resort to an available state or local agency.

"We are here concerned with amended Title VII. However, except for an enlargement of time for filing a charge from 90 to 180 days and concomitant extension of the deferral provision to 300 days, there were no substantive changes made in § 2000e-5(d) (renumbered § 2000e-5(e)).

"Thus a charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferral state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal Act."

(Olson, supra, 511 F.2d at 1232-33; footnotes omitted.)

Accord, Geromette, supra; Wiltshire v. Standard Oil Co. of California, 447 F. Supp. 756 (N.D. Cal. 1978); *Bittner v. Combustion Engineering,* 19 FEP Cases 1295 (N.D. Cal. 1979).

Second, the phrase "initially instituted" could refer to the sequence of filing. This is the conclusion reached by the Fourth Circuit in *Doski v. M. Goldseker,* 539 F.2d 1326 (4th Cir. 1976). *Doski* involved a plaintiff who first instituted timely state proceedings 281 days after the alleged discrimination. The plaintiff in that case submitted a charge to the EEOC on the same day. Three days later, 284 days after the alleged discrimination, the EEOC was notified that the 706 Agency had terminated its proceedings. In holding that in such circumstances the plaintiff could utilize the extended 300-day filing period provided by § 706(e), the court said:

> "Goldseker argues, and the district court agreed, that although the statute does not say so, the enlarged period of 300 days is not invoked unless the charges were filed with the state agency within 180 days of discrimination. Doski and the EEOC, as *amicus curiae,* contend that as long as

the charges are timely filed under the state agency's own regulations, the 300-day filing period with EEOC applies.

"The words of the statute provide no support for Goldseker's argument. On its face the section requires only that proceedings be 'initially instituted' with the State or local agency. While it clearly states that unless this procedure is followed charges must be filed within 180 days with the EEOC, it does not on its face require or in any way intimate that charges with the State or local agency must be initially instituted *within 180 days.* Goldseker argues that in using the word 'initially,' Congress meant to refer back to the first time limit period of 180 days. The best that can be said for such an argument is that if Congress meant that it failed to give it expression. Certainly we cannot read 'initially' to mean a limited time period.

"We disagree with Goldseker that *Love v. Pullman Co.,* 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972) and *Vigil v. American Telephone and Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972), indicate that the phrase 'initially instituted' does not refer to the order of filing the charge. All those cases hold is that a complainant's failure to file first with the state agency is not fatal to subsequent prosecution of a claim. But the meaning of the phrase is well settled: The state or local agency should be given first opportunity to act on the complaint. *Ugianski v. Flynn and Emrich Co.,* 337 F.Supp. 807, 808 n.1 (D.Md.1972). *See Ortega v. Construction and General Laborers' Union* No. 390, 396 F.Supp. 976, 981-82 (D.Conn. 1975); *Ashworth v. Eastern Airlines, Inc.,* 389 F.Supp. 597, 601 (E.D.Va.1975). *Cf. Love v. Pullman, supra* 404 U.S. at 526, 92 S.Ct. 616."

(Doski, supra, 539 F.2d 1329-30; footnotes omitted and emphasis in original.)

The case of *Williamson v. Chevron Research Co.,* 12 FEP Cases 95 (N.D. Cal. 1976), demonstrates the *Doski* interpretation is reasonable only if the EEOC considers

a charge to be "filed" after deferral:

> "The literal language of the statute states that the person aggrieved has 300 days in which to file with the EEOC if he 'initially' filed a charge with a state unfair employment practices agency such as the FEPC. It is true that, when plaintiff filed his charge, he went first to the office of the EEOC. However, using a procedure approved by the Supreme Court in Love v. Pullman, supra, the EEOC held his charge in abeyance while it filed a charge on his behalf with the FEPC. Only after the FEPC waived jurisdiction did the EEOC treat plaintiff's charge as formally before it. Plaintiff thus 'initially' filed his charge with the FEPC within the meaning of the statute. Ashworth v. Eastern Airlines, Inc., 389 F.Supp. 597, 601, 10 FEP Cases 672, 675 (E.D. Va. 1975).
>
> "This construction of the statute does no violence to the policy considerations which caused Congress to give persons 300 days to file with the EEOC if they initially filed a charge with a state agency such as the FEPC. The purpose of the extended filing period was 'to give the state agency an initial opportunity to process the claim without jeopardizing the federal right. . .' Olson v. Rembrandt Printing Co., 511 F.2d at 1232, 10 FEP Cases at 29. Where, as here, the claim is timely filed with the state, the state commission is afforded such an opportunity. Ugiansky v. Flynn & Emrich Co., 337 F.Supp. 807, 809 n.4, 4 FEP Cases 336, 337 (D.Md. 1972).
>
> "Moreover, if this court were to hold that plaintiff may not avail himself of the 300 day filing period because he first walked into the EEOC office rather than the FEPC office to file his charge, it would create an untenable and fortuitous distinction between two groups of plaintiffs in the same state. Those who first filed with the EEOC would have to file in 180 days, while those who filed first with the FEPC would have 300 days. Such a result flies in the face of the Supreme Court's mandate in Love v. Pullman, supra, that federal courts should avoid erecting technical barriers to those attempting to assert Title VII rights. Accord, Ugiansky v. Flynn & Emrich Co., supra."

(Williamson, supra, 12 FEP Cases at 96.)

Silver's charge clearly was untimely under the *Olson* interpretation, because Silver did not institute any proceedings within the initial 180-day filing period, even if Silver's charge-letter to the EEOC were to be considered "filed" on receipt.

Similarly, Silver's charge-letter was untimely under the *Doski* interpretation as well. If, as the Second Circuit below held, the EEOC "filed" Silver's charge-letter on receipt, then under the *Doski* interpretation Silver in fact "initially instituted" federal, rather than state, proceedings, and was not entitled to the extended 300-day filing period.

Although both *Olson* and *Doski* proffer plausible interpretations of the "initially instituted" language, it is submitted that the *Olson* reading of § 706(e) is more reasonable than *Doski*'s. *Olson* requires exactly the same degree of diligence on the part of all aggrieved persons -- every complainant must file somewhere within 180 days. On the other hand, the *Doski* reading extends a bonus to an aggrieved person who is lucky enough to live in a deferral state with a state limitations period that exceeds 180 days. Where there are two proffered interpretations, both of which purport to read the statutory language literally, the Court should prefer the interpretation that provides the most reasonable results.

III. The Legislative History Supports Mohasco's Interpretation That § 706(c) Prohibits The EEOC From "Filing" A Charge Until After The Expiration Of Any Required Deferral Period And That § 706(e) Requires An Initial Filing Within 180 Days Of The Alleged Unlawful Discriminatory Practice.

Silver and the EEOC have contended, and the majority of the Second Circuit below found, that the legislative

history supports the proposition that the EEOC can treat a charge arising in a deferral state as "filed" when received for purposes of the limitations period provided by § 706(e), but only as "received" for purposes of deferral to the state pursuant to § 706(c). Furthermore, the Second Circuit concluded that a charge so "filed" by the EEOC within the 300-day limitations period is timely so long as state proceedings are thereafter timely instituted, even though no filing whatsoever was made within 180 days of the alleged unlawful discriminatory practice.

Before embarking on a discussion of the legislative history of §§ 706(c) and (e), it is well to bear in mind a particularly relevant statement made by this Court when confronted with an attack on Title VII § 706(f)(1):

> "Only if the legislative history of § 706(f)(1) provided firm evidence that the subsection cannot mean what it so clearly seems to say would there be any justification for construing it in any other way. . . ."
>
> *(Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 361 (1977) (Stewart, J.).)

What little support may be found in the legislative history for the Second Circuit's construction of the statute is collected in the majority opinion of the court below:

> ". . .[B]efore the statute was amended in 1972 [footnote omitted], the Senate passed a bill designed to make explicit the construction we are adopting today. *See* S.2515, 92nd Cong., 2d Sess., 118 Cong. Rec. 289, 290 (1972).[3] The House-Senate Conference Committee, however, retained the pre-1972 language because '[n]o change in these provisions was deemed necessary in view of the recent Supreme Court decision of *Love v. Pullman Co.,'* 118 Cong. Rec. 7564 (1972). Moreover, the Conference Committee explicitly endorsed the decision of the Tenth Circuit in *Vigil* and stated that 'in order to protect the aggrieved person's right to file with the EEOC within the time periods specified. . ., a charge filed with a State or local agency may also be filed with the EEOC during the 60-day deferral period.' *Id.* It appears clear, therefore, that Congress accepted our interpretation of the statute as correct."
>
> (Cert. Pet. App. A33 - A34; footnote renumbered.)

---

3 "S.2515 would have removed any reference to 'filing' in § 706(c) and would have stated instead that 'the Commission shall take no action' before the expiration of the sixty-day deferral period. The Senate asserted that

> [t]he present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language *clarifies* the present statute by permitting the charge to be filed but prohibiting the Commission from taking action with respect thereto until the [deferral] period has elapsed.
>
> "S.Rep.No. 92-415, 92nd Cong., 1st Sess. 36 (1971) (emphasis added)."

However, while these tidbits might be viewed as support for the Second Circuit's conclusion, they are not persuasive when viewed in the light of the *whole* legislative history. For instance, the district court below (Cert. Pet. App. A16) cited the following pronouncement of the managers at the conference on the bill to amend Title VII:

> "The Senate amendment contained two provisions allowing the Commission to defer to state and local equal employment opportunity agencies. It deleted the language of existing law providing that no charge may be filed during the 60-day period allowed for the deferral and substituted a provision prohibiting the Commission from acting on such a charge until the expiration of the 60-day period. The House bill made no

change in existing law. The Senate receded with an amendment that would re-state the existing law on the deferral of charges to state agencies. The conferees left existing law intact with the understanding that the decision in *Love v. Pullman,* [404 U.S. 522] (1972) interpreting the existing law to allow the Commission to receive a charge (but not act on it) during such deferral period is controlling."

(Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 118 Cong. Rec. 6646-6647 (1972), *reprinted in* U.S. Cong. & Ad. News 2179, 2181.)

Representative Dent, one of the proponents of the 1972 amendments in the House of Representatives, explained the filing procedures as follows:

"Procedure Where No State Equal Employment Opportunity Law Exists

(1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.

. . .

"Procedure Where State Equal Employment Opportunity Law Exists

(1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.

"If a charge is initially filed with a state or local agency, such charge must be filed with the Commission within 300 days after the alleged unlawful practice has occurred or within 30 days after receipt of notice that the state or local agency has terminated its proceedings.

. . ."

(118 Cong. Rec. 7569 (March 8, 1972).)

As noted by then-Judge Stevens in *Moore, supra,* 459 F.2d at 824-25, Judge Meskill in dissent from the Second Circuit's decision below (Cert. Pet. App. A39 - A42), and Judge Schwarzer in *Wiltshire, supra,* 447 F. Supp. at 758, Title VII's filing provisions are the result of the so-called Dirksen-Mansfield compromise. Pursuant to that compromise, deferral states were to have exclusive jurisdiction for at least 60 days before the EEOC could act, but an aggrieved person who followed state procedure was nevertheless required to "file" a charge with the EEOC within the extended limitations period. Thus, before passage of the 1964 legislation, Senator Dirksen clearly explained the relationship between the proposed deferral section and the proposed limitations section:

" 'New subsection (b) provides that where there is such State or local law, no charge may be filed with the Commission by the person aggrieved until 60 days (120 days during the first year after the effective date of a new state or local law) after proceedings have been commenced under the State or local law. . . .

. . .

" 'New subsection (d) requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in subsection (b), he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. The addi-

tional 120 days is to allow him to pursue his remedy by State or local proceedings.

. . .' "

(Moore, supra, 459 F.2d at 825, n. 35, quoting EEOC's "Legislative History of Title VII and XI of Civil Rights Act of 1964", at p. 3018 [hereinafter referred to as "Leg. Hist."].)

Similarly, Senator Humphrey explained the compromise in this way:

" 'If the practice complained of occurs in a State or locality which has a law prohibiting such practices and establishing an agency to deal with them and there is no such agreement, the *individual complainant cannot file his charge with the Commission until the State or local agency has been given an opportunity to handle the problem under State or local law.* However, after the agency has had 60 days to adjust the complaint, or after it terminates proceedings on it, the complainant may go to the Federal Commission. The 60-day period will be 120 days during the first year that a State or local law is in effect.' [citation omitted] (emphasis added)."

(Moore, supra, 459 F.2d at 825, n. 34, quoting Leg. Hist. at 3003.)

These quoted provisions led then-Judge Stevens to conclude:

"The legislative history as a whole indicates a basic purpose to require the complainant to make his initial filing within 90 days; the extension of the period to 210 days in certain states was plainly intended to permit him to 'exhaust' the state procedures. *There is no suggestion that complainants in some states were to be allowed to proceed with less diligence than those in other states.* The above excerpts indicate that unless a complainant pursues his state remedies with sufficient diligence to permit the state, within 210 days,

either to complete its action or to have 60 days in which to act without federal interference, he may not file a timely charge with the EEOC."

(Moore, supra, 459 F.2d 825, n. 35; emphasis added.)

Accord Olson, supra, 511 F.2d at 1232-33; *Wiltshire, supra,* 447 F. Supp. at 759, n. 6.

Judge Meskill in dissent below elaborated further on this statement:

"When Title VII was amended in 1972, both limitations periods were lengthened. New section 706(e) specifies a base period of 180 days and a period of 300 days applicable to complainants subject to the statute's deferral requirements. The differential between the two remained the same: an aggrieved individual in a deferral state still has an extra 120 days in which to file with the EEOC so that compliance with the deferral requirements of the act can be achieved. Thus the limitations section as amended still ensures that no penalty is exacted from those in deferral states. No more diligence is required of those complainants than is required of their counterparts in states lacking deferral agencies.

"Like the cases on which it relies, the majority opinion overlooks the legislative history which clearly establishes that the statute is to be applied as it reads. *See Richard v. McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972); *Anderson v. Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); and *Vigil v. American Telephone and Telegraph Co.,* 455 F.2d 1222 (10th Cir. 1972). The majority offers nothing to support the assumption, necessarily implicit in today's decision, that Congress intended to give complainants in deferral states a 120 day bonus and to excuse them from exercising roughly the same degree of diligence required of persons in non-deferral states. It should be noted that in 1975, the Eighth Circuit, sitting en banc, concluded that

an examination of the legislative history excerpted above necessitated a rethinking of *Richard v. McDonnell Douglas Corp., supra,* which had attempted to interpret Title VII's filing requirements without reference to this history.

. . .

"The only legislative history on which the majority relies is an excerpt from a report of the House-Senate Conference Committee on the 1972 amendments, which endorsed the decision of the Tenth Circuit in *Vigil.* However, the fact remains that in 1972 Congress chose to leave the design and wording of the limitations subsection intact; the only changes made were a renumbering of the section and the lengthening of the two limitations periods contained therein. In my view, since the intent of the enacting Congress is unambiguous and the amending Congress chose to retain the original scheme, the evidence is insufficient to permit the inference that the later Congress intended to accomplish wholly new ends by leaving intact the scheme constructed by an earlier Congress which had different purposes in mind. *See Oscar Mayer & Co. v. Evans,* 47 U.S.L.W. 4569, 4571-72 (U.S. May 21, 1979)."

(Cert. Pet. App. A40 - A42.)

In *Doski,* the Fourth Circuit considered the legislative history of § 706(e), but the court first cautioned:

> "Goldseker places great weight on what it argues is legislative history supportive of its position. We believe what the Supreme Court stated in *United States v. Oregon,* 366 U.S. 643, 648, 81 S. Ct. 1278, 1281, 6 L.Ed.2d 575 (1961), is fully applicable here:
>
> > Having concluded that the provisions of [the statute] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act. Since the State has placed such heavy reliance upon that history, however, we do deem it appropriate to point out that this history is at best inconclusive.
>
> "(Footnotes omitted.) Similarly, we have stated that '[w]e do not think it permissible to construe a statute on the basis of a mere surmise as to what the Legislature intended and to assume that it was only by inadvertence that it failed to state something other than what it plainly stated.' *United States v. Deluxe Cleaners and Laundry, Inc.,* 511 F.2d 926, 929 (4th Cir. 1975). . . ."
>
> *(Doski, supra,* 539 F.2d at 1332.)

Then after considering, among other things, the above-quoted portion of Representative Dent's explanation, the court concluded:

> ". . .When the above statement of liberal intent is read together with citation to *Vigil* in the [Section-by-Section] analysis of the preceding subsections, we are left with no clear explanation of legislative purpose. We conclude that the legislative history is not definitive enough to overcome the unambiguously clear wording of the structure."
>
> *(Doski, supra,* 539 F.2d at 1332-33; footnotes omitted.)

In *Doski,* the Fourth Circuit specifically rejected the Eighth Circuit's decision in *Olson* that § 706(e) requires an aggrieved person, to be entitled to the extended 300-day filing period, to file with the 706 Agency within 180 days. Thus, the *Doski* court found the legislative history inconclusive, and concluded it was therefore required to apply the statute literally. The problem is that while both *Olson* and *Doski* purported to read the statute literally, they reached different conclusions. Subsequently, the district court in *Wiltshire,* after careful consideration of the cases and the legislative history, concluded that *Olson*'s reading of the statute was correct and that *Doski*'s was not. *Wiltshire, supra,* 447 F. Supp. at 758-64. *Accord Bittner, supra,* 19 FEP Cases at 1297. It is important to note

both *Olson* and *Doski* are entirely consistent with *Moore* and *Love,* and that under either interpretation, Silver's charge was untimely filed.

It is submitted that the legislative history supports the conclusion reached by *Olson, Geromette, Wiltshire* and *Bittner* that an aggrieved person must file *somewhere* within 180 days.

IV. Mohasco's Interpretation Of § § 706(c) And (e) Is Reasonable And Would Not Lead To Anomaious Results.

It is submitted that Mohasco's interpretation of § § 706(c) and (e) does no more than track the statutory language and intent, and does not conflict with the EEOC's longstanding procedure for forwarding complaints arising in a deferral state to the 706 Agency for initial processing.

The statutory language mandates that the EEOC be prohibited from considering a charge to be "filed" until after the expiration of any required deferral period. This conclusion is buttressed by the clear legislative history showing a Congressional intent to require prior resort to available state remedies.

Furthermore, the legislative history demonstrates Congress intended that, in a deferral state, proceedings must be instituted with the state agency within 180 days of the alleged unlawful discriminatory practice.

This interpretation requires the same diligence of all complainants. No bonus period is given to a complainant merely because he is fortunate enough to reside in a deferral state. Further, no benefit is extended to a complainant who resides in a deferral state because that state has a long limitations period for filing charges with the state agency.

Mohasco's interpretation merely interprets this statute as Congress wrote it.

CONCLUSION.

For the foregoing reasons, we respectfully request the Court to reverse the decision of the Second Circuit Court of Appeals and remand this case to the district court with directions to dismiss all aspects of this lawsuit relating to any claims of discrimination by Mohasco alleged to have occurred more than 180 days or, alternatively, more than 300 days before Silver's complaint was "filed" with the EEOC.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-616

MOHASCO CORPORATION, *Petitioner,*

v.

RALPH H. SILVER, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR RESPONDENT RALPH H. SILVER

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BRIEF FOR RESPONDENT RALPH H. SILVER

OPINIONS BELOW

The Opinion of the District Court for the Northern District of New York of October 17, 1978, granting Mohasco Corporation's (hereinafter "Mohasco") Motion for Summary Judgment, is reported unofficially at 119 FEP Cases 677 and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert.Pet.App. A1-A22). The Opinion of the Court of Appeals of July

18, 1979, reversing the trial court, is officially reported at 602 F.2d 1083 and unofficially reported at 20 FEP Cases 464 and 20 CCH EPD ¶ 30, 137, and is reproduced in the Appendix to the Petition for a Writ of Certiorari (Cert.Pet.App. A23-A44).

STATUTES INVOLVED

The case involves the interpretation of provisions of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII"), specifically § 706(c), 42 U.S.C. § 2000e-5(c) and § 706(e), 42 U.S.C. § 2000e-5(e). Those sections provide in relevant part:

> § 706(c) In the case of an alleged unlawful employment practice occuring in a State . . . which has a State . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . authority to grant or seek relief from such practice . . ., no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law, unless such proceedings have been terminated. . . .
>
> * * *
>
> § 706(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State . . . agency with authority to grant or seek relief from

> such practice . . ., such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State . . . agency has terminated the proceedings under the State . . . law, whichever is earlier. . . .

These statutory provisions are set forth in full in Appendix B to the Petition for a Writ of Certiorari (Cert.Pet.App. A51-A52).

QUESTION PRESENTED

In states having fair employment practices agencies, does an aggrieved person have 300 days from the occurrence of the alleged unlawful employment practice within which to file a charge with EEOC in order to invoke a federal remedy, or must the charge be filed within a shorter time, 240, 180, or some other number of days for that purpose?

STATEMENT OF THE CASE

Respondent, Ralph H. Silver ("Silver") was employed by petitioner, Mohasco Corporation ("Mohasco") as an economist. He was discharged on August 29, 1975 after thirteen months of employment. Silver, who is Jewish, claims that his employment was marked by harassment and abuse intended to force his resignation from the position he characterizes as a "minority slot", created to give the appearance that Mohasco was in compliance with Title VII. Silver claims that he was hired and subsequently discharged because

of his religion, both acts integral to the scheme by which Mohasco sought to create the fiction of its commitment to equal employment opportunity for Jews and other minorities. (App. 3-5; 13-14). Silver additionally claims that following his unlawful discharge Mohasco disseminated false and derogatory references to prospective employers, and advised them that he was Jewish, as if this fact would justify Silver's termination.

On June 15, 1976, 291 days after his discharge, Silver filed a charge with the District Office of the Equal Employment Opportunity Commission ("EEOC") in Buffalo, New York, in the form of a letter dated June 10, 1976, alleging that he had been both hired and fired by Mohasco because of his religion. (App. 3).[1] That same day, EEOC mailed a copy of his charge to the New York State Division of Human Rights ("State Division") in accordance with its standard practice and in compliance with Title VII deferral procedures. EEOC also advised the State Division that it would automatically assume jurisdiction over the charge at the end of the 60-day deferral period, or earlier, if the State Division terminated its proceedings sooner. (App. 7). On June 16, 1976, EEOC notified Silver of its deferral to the State Division. (App. 9).

On August 20, 1976, EEOC began formal processing of Silver's charge. (App. 15). On February 9, 1977,

[1] The timeliness of Silver's charge of black-listing in connection with references provided to prospective employers is not presented here. This Court denied the Petition for Writ of Certiorari as to that aspect of the decision of the Court of Appeals.

the State Division issued a determination finding "no probable cause to believe that Silver had been terminated on account of his religion." (Cert. Pet. App. A45). EEOC, on August 24, 1977, without further investigation, adopted the State Division's determination and notified Silver of his right to sue in the Federal District Court. (Cert. Pet. App. A49). Within 90 days of receipt of the right to sue letter, Silver commenced this action *pro se* in the United States District Court for the Northern District of New York, alleging violations of his rights under Title VII.

The District Court, without reaching the merits, granted summary judgment to Mohasco on the ground that Silver did not file a timely charge under Section 706(e), thus depriving the District Court of jurisdiction over the Title VII suit.[2] (Cert. Pet. App. A1-22).

On appeal, the Second Circuit (Judge Meskill dissenting) reversed the decision of the District Court, holding that Silver's charge was timely filed with the EEOC.

SUMMARY OF ARGUMENT

The filing requirements of Title VII, which determine access to the federal courts and to a federal remedy for complaints of employment discrimination, have caused considerable confusion and uncertainty.

[2] Silver's suit as to the individual defendants (five Mohasco managers) was dismissed by the District Court on other grounds, and is not relevant to the question presented herein. (Cert. Pet. App. A3-A6).

The confusion stems from Title VII's statutory scheme. Different filing periods are provided depending upon whether or not the state in which the unlawful act is alleged to have occurred has a state or local agency to process the complaint. It is undisputed that these different filing requirements reflect Congressional intent that state or local agencies be given initial opportunity to act to resolve the claim.[3] The particular source of difficulty is that Congress adopted two subsections[4] to the provision entitled Prevention of Unlawful Employment Practices, both of which establish time limits framed in terms of "filing" with EEOC.

Section 706(c) in pertinent part provides:

> In the case of an alleged unlawful employment practice occurring in a State . . . which has a State or local authority to grant or seek relief from such practice . . . *no charge may be filed* . . . [with the EEOC] by the person aggrieved *before the expiration of sixty days after the proceedings have been commenced under State or local law,* unless such proceedings have earlier terminated, provided that such sixty-day period shall be extended to one hundred twenty days during the first year after the effective date of such State or local law. . . . (emphasis added)

[3] See remarks of Senator Humphrey, "First, we were concerned that states and localities be afforded every opportunity to resolve these difficult problems . . . by means of their own agencies and instrumentalities." 110 Cong. Rec. 12714 (1964).

[4] Prior to the 1972 amendment, 86 Stat. 103, the time limitations now provided in Section 706(e) were found in Section 706(d). The amendment renumbered the section and extended the limitations periods from 90 and 200 days to 180 and 300 days respectively. No other change was made in Section 706(e). Section 706(c) was renumbered from Section 706(b) without other change.

Section 706(e) provides:

> A charge filed under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . ., such charge *shall be filed* by or on behalf of the aggrieved party *within three hundred days* after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . . (emphasis added)

The sections have different purposes. Section 706(c), which effectuates the policy of allowing state and local authorities the first opportunity to resolve employment discrimination complaints, grants a fixed time of exclusive jurisdiction to the local agency before EEOC may act; Section 706(e) establishes time limitations within which a charge must be "filed" with EEOC to permit a complainant to seek a federal remedy.

The procedural questions of timely filing under Section 706(e) arise only in deferral states. An employee, and EEOC, in a state without an appropriate state agency have clear instructions: the charge must be filed with EEOC within 180 days after occurrence of the discriminatory act.

It is the employee in a deferral state whose right to a federal remedy has been subject to such differing interpretations as reflected in the District Court and Circuit Court decisions in this case. While the statute appears to give 300 days within which to file with EEOC, and the EEOC by regulation has adopted that construction, employers, as here, have asserted two defenses: one, that the filing is untimely because the 300 day period of Section 706(e) does not mean 300 days from the date of the occurrence of the act complained of; and two, that the initial filing was with the wrong agency.

Those courts addressing the issue of the filing requirements frequently have been inspired to an eloquence not often encountered in discussions of procedural questions. The technical requirements have been described, for example, as holding victims of discrimination "accountable for a procedural prescience that would have made a Baron Parke or a Joseph Chitty proud". *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889, 892 (2d Cir. 1971).

This case presents a classic example of the kinds of problems that have been the subject of extensive litigation. Silver filed a charge with EEOC within 300 days after his discharge from Mohasco. EEOC considered his charge timely and deferred the charge to the State Division; upon completion of the deferral period, EEOC acted upon Silver's charge, ultimately issuing to him a right to sue letter.

Indisputably, Silver's right to a federal remedy is not dependent upon the outcome of the state agency

proceedings. *Alexander* v. *Gardner Denver*, 415 U.S. 36, 44-47 (1974). Moreover, the fact that Silver's charge was submitted first to EEOC, which forwarded it to the State Division, should be of no legal consequence.[5] *Love* v. *Pullman*, 404 U.S. 522, 525-26 (1972). What remains for final disposition then is the question of whether the word "filed" in §706(e) means "delivered to", or whether, because it is also used in Section 706(c), it must be given a different meaning. If the phrase "no charge may be filed" in Section 706(c) is read literally, that is, filing with EEOC is not permitted within the 60-day state agency deferral period, then a charge "filed" within the 300 days permitted by Section 706(e) is untimely, since the 300 days is necessarily reduced by the 60-day deferral period. Viewed from this perspective, a complainant must "file" within 240 days after the alleged discriminatory act.

It has been variously contended that the meaning of Section 706(e) is "plain" or "clear", or if ambiguous, must be construed narrowly. Contenders for the proposition that the "plain meaning" requires restrictive application argue that the word "filed" must be given the same meaning in both Sections 706(c) and (e). The result would be to hold that Silver's claim could not have been "filed" with EEOC until 60 days after EEOC

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[5] The District Court below, while acknowledging what appeared to be "anomalous procedural modes", held that if on June 15, 1976, Silver had gone directly to the State Division, and thereafter, within 8 days, notified EEOC, his charge would have been deemed filed on the 300th day after his discharge, and would have been timely. (Cert. Pet. App. A11).

deferred his charge to the State Division. This interpretation would have required Silver's claim to reach the state agency within 240 days after his discharge to have been timely, or to risk forfeiture if the state took the full 60 days of its deferral period. Mohasco also expresses another view of the plain meaning of Section 706(e); that it requires a charge in a deferral state to be filed within 180 days of the occurrence of the unlawful act, either with EEOC *or* with the state agency. In short, Mohasco postulates that an aggrieved person must "file somewhere" within 180 days in order to file a timely charge with EEOC.[6]

Arguments for literal equation of the words in the different sections would result in requiring filing in a deferral state within 240 days of the act complained of so as to allow the state agency 60 days of exclusive jurisdiction, although the figure 240 is found nowhere in the statute. The alternative, even more restrictive view, would eliminate entirely the distinction made by §706(e) between time for filing in deferral and in non-deferral states by compelling filing "somewhere" within 180 days.

Others, who also argue that the meaning is plain or clear, or if not, that any ambiguity must be resolved in favor of the aggrieved employee, would read the word "filed" in §706(e) as meaning "received" or "delivered to" for the purpose of measuring timely filing by the complainant. This interpretation would also require

[6] Brief of Petitioner, pp. 29-38; *See also* Amicus Curiae, Equal Employment Advisory Council, p. 7.

EEOC to refrain from processing the charge for up to 60 days, but would read the word "filed" in §706(c) as meaning only that EEOC may not process the charge before the deferral period ends. This latter interpretation, adopted by the Second Circuit below, holds that delivery of the charge to EEOC within any time up to 300 days is timely for purposes of entitlement to a federal remedy.

Decisions of this Court, the legislative history of the 1972 amendments to the statutory provisions, and the administrative interpretations of EEOC, all compel the conclusion that the Second Circuit correctly held that a charge is "filed" for the purpose of §706(e) when received by EEOC, and "filed" for the purposes of §706(c), when the deferral period ends, thereby permitting EEOC to begin acting on the charge.

Argument

I. Section 706(e) Permits A Complainant In A Deferral State To Invoke Tittle VII Remedies By Delivering His Complaint To The EEOC Within 300 Days After The Occurrence Of The Alleged Unlawful Practice.

Introduction

Although Title VII was enacted to provide a federal remedy for discriminatory employment practices, Congress intended that an aggrieved employee first seek help from state or local agencies, if any were available. The

statutory scheme created by Congress relies on private, lay citizens for enforcement of the federal policy against discrimination; private litigation is the primary enforcement vehicle. Thus, courts interpreting Title VII have recognized that its procedural provisions, designed to give the federal, state and local governments an opportunity to remedy discrimination by administrative means, are secondary to the overriding purpose of creating a private right-of-action to enforce the law.

Having given to workers a federally protected right to be free of employment discrimination, Congress also gave to them the burden of comprehending what was expected in their efforts to seek redress under the new law. The aggrieved employee in a non-deferral state was fortunate; as to him the rules were reasonably clear. His counterpart in a state with a state or local agency, however, was in an unenviable position; he was caught in a welter of state filing requirements, EEOC regulations, and Title VII provisions, all of which became barriers to which employers could refer in turn. It has been observed that "to meet the Act's [filing] requirements, a plaintiff would need to have a Philadelphia solicitor in constant attendance and he might miss a turn even with this assistance." *Vigil* v. *AT&T,* 305 F.Supp. 44, 47 (D. Colo. 1969), *aff'd,* 445 F.2d 1222 (10th Cir. 1972).

Among the early questions of construction was whether a complainant in a deferral state was required to file with the state or local agency *before* going to the EEOC. This question was finally answered in *Love* v. *Pullman,* 404 U.S. 522 (1972), wherein it was held that a

charge filed initially with the EEOC may be held in "suspended animation" by the Commission and automatically referred by EEOC to the appropriate state agency. 404 U.S. at 526. After the 60-day deferral period ended, this Court held, EEOC may begin its own investigation. Thus, the Court protected the employee from the risk attendant upon having to file two different charges, each subject to its own complicated timetable.

That, of course, did not end the matter. Employers also sought to have the §706(e) filing requirements in deferral states narrowly restricted. Four circuits, prior to the case at bar, faced the questions which concern the meaning of "filed" as used in §706(c) and §706(e). Three circuits adoped a liberal interpretation allowing the claimant maximum possible benefit of the §706(e) filing limitation. In *Anderson* v. *Methodist Evangelical Hospital,* 464 F.2d 723 (6th Cir. 1972) and *Richard* v. *McDonnell Douglas Corp.,* 469 F.2d 1249 (8th Cir. 1972),[7] the Sixth and Eighth Circuits relied on the equitable concept of tolling to prevent expiration of the statutory filing period, holding that the initial EEOC filing tolled the §706(e) time limitations during deferral to the state agencies. The Tenth Circuit in *Vigil* v. *AT&T* 455 F.2d 1222 (10th Cir. 1972), held that a complainant could file a valid charge with the EEOC within the state

[7] The Eighth Circuit has revised its interpretation in *Richard.* In *Olson* v. *Rembrant Printing Co.,* 511 F.2d 1228 (8th Cir. 1975) (en banc), it held that a complainant in a deferral state must file with either the state or EEOC within 180 days.

deferral period, and the *receipt* of the charge met the requirement of Section 706(d) [now 706(e)], even though EEOC could not proceed until the state agency had the complaint for 60 days. 455 F.2d at 1224.

Only the Seventh Circuit, in *Moore* v. *Sunbeam,* 459 F.2d 811 (7th Cir. 1972), in an opinion written by Justice Stevens, prohibited §706(e) filing with EEOC during the state deferral period.[8]

In considering the 1972 amendments to §706(c) of the Act, Congress expressly approved the constructions adoped in *Love* and *Vigil,* and thus provided the basis for the construction adopted by the Second Circuit in this case.

A. *Legislative History Of 1972 Amendments*

When Congress reexamined Title VII in advance of the major changes made in 1972, it expressly considered the time requirements established by §706(c) and §706(e). The Congressional intent expressed was that the deferral requirement of §706(c) was not intended to shorten the filing time permitted under §706(e) in a deferral state; its understanding that the language of 706(c) was not intended to bar a complainant from filing with EEOC *within the deferral period* was explicit.

As initially presented in the bill passed by the Senate, S. 2515, Section 706(c) would have been amended to read:

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[8] The Second Circuit in its *Silver* decision noted that the 1972 amendments were not in effect when *Moore* was decided and the Court did not consider their impact. (Cert. Pet. App. A33).

> (c) In the case of a charge filed by or on behalf of a person claiming to be aggrieved alleging an unlawful employment practice occuring in a State or political subdivision of a State which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . upon receiving notice thereof *the Commission shal! take no action with respect to the investigation of such charge before the expiration of sixty days after proceedings have been commenced under the State or local law,* unless such proceedings have been earlier terminated, except that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. . . .

118 Cong. Rec. 290 (1972) (emphasis added). By eliminating the phrase "no charge shall be filed" [prior to the end of the deferral period], the Senate's language was intended to make it clear that a charge could be filed with the EEOC prior to deferral, and then held in abeyance without action by the EEOC until deferral had been completed. 118 Cong. Rec. 4941 (1972) (Section-by-Section Analysis). In discussing the new language, the Section-by-Section Analysis refers to "a similar holding by the Supreme Court in *Love* v. *Pullman Co.,*" *id.*

However, the House-Senate Conference rejected the change made by the Senate bill as *unnecessary.* As stated in the Conference Report,

> Sections 706(c) and (d) - These subsections, dealing with deferral to appropriate State and local equal

employment opportunity agencies, are identical to sections 706(b) and (c) of the Civil Rights Act of 1964. No change in these provisions was deemed necessary in view of the recent Supreme Court decision of *Love* v. *Pullman Co.*, _____ U.S. _____, 92 S. Ct. 616 (1972) which approved the present EEOC deferral procedures as fully in compliance with the intent of the Act. That case held that the EEOC may receive and defer a charge to a State agency on behalf of a complainant and begin to process the charge in the EEOC upon lapse of the 60-day deferral period, even though the language provides that no charge can be filed under section 706(a) [now Section 706(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. *Similarly, the recent circuit court decision in Vigil* v. *AT&T,_____ F.2d _____*, 4 FEP Cases 345 (10th Cir. 1972), *which provided that in order to protect the aggrieved person's right to file with the EEOC within the time periods specified in section 706(c) and (d) [i.e., present Section 706(e)], a charge filed with a State or local agency may also by filed with the EEOC during the 60-day deferral period, is within the intent of this Act.*

118 Cong. Rec. 7564 (1972) (emphasis added) (Section-by-Section Analysis)[9] Thus, the Conference Committee, in reporting on the bill that was eventually passed without further change by both Houses, expressly approved *Vigil, supra,* and concurred in *Vigil's* holding

[9] The citation is to the Conference Report as submitted to the House of Representatives. The same Section-by-Section Analysis was submitted to the Senate by Senator Williams, the Senate sponsor, at 118 Cong. Rec. 7166-7168 (1972).

that the language "no charge may be filed" appearing in Section 706(c) does *not* prevent filing during the deferral period to satisfy the Section 706(e) time requirements. The deferral provision, in short, simply has no bearing on filing for purposes of complying with the statute of limitations contained in Section 706(e).[10]

Inasmuch as this Court has held that the Section-by-Section analysis provides "the final and conslusive confirmation of the meaning" of the statute, *Occidental Life Insurance* v. *EEOC,* 432 U.S. 355, 365 (1977), the express endorsement by Congress of the constructions of the filing requirements by this Court in *Love* v. *Pullman* and of the Tenth Circuit in *Vigil* should have put to rest the question presented in this case.

In *Love,* this Court referred to the inappropriateness of procedural technicalities in "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (404 U.S. at 526), and specifically found that a procedure, whereby a charge filed with the EEOC prior to exhaustion of the state remedy was referred by it to the state agency, and then *formally* filed once the state agency declined to take action, fully complied with the intent of the Act. *Id.* at 425. Thus, this

[10] Reference by petitioner to Explanation of Procedures by Representative Dent (Pet. Br., pp. 31-37) is not sufficient to overcome the clear meaning of the Section-by-Section Analysis. The portions of quoted material are from a larger text, in which Rep. Dent *paraphrased* the procedures under Section 706. 118 Cong. Record—House 7564. Moreover, there is no reason to attribute to Rep. Dent, a leading proponent of measures to broaden the reach of Title VII, any effort to narrow its application.

Court disposed of any question of the order in which filing must occur, or that a second "filing" by the aggrieved party was required.

In *Vigil,* the 10th Circuit held that a valid charge could be filed with EEOC during the state deferral period, despite the employer's contention that a literal reading of §706(c) would prohibit "filing" during the 60-day period. *Vigil,* referring to *Love,* allowed §706(e) filing to occur upon initial receipt of the charge, while maintaining untouched the 60-day deferral required by Section 706(c). 455 F.2d at 1224.

Despite contemporaneous decisions to the contrary, Congress in 1972 expressly referred to *Love* and *Vigil* as the judicial interpretations upon which it was relying as providing the construction of §706(c). This legislative history thus establishes that a complainant in a deferral state may come *first* to EEOC; that EEOC may file the charge with the state agency, while holding it in "suspended animation" during the deferral period; and that, for §706(e) purposes, the charge is deemed filed upon initial receipt by EEOC.

B. *EEOC Interpretation.*

In interpreting Section l4(b) of the Age Discrimination in Employment Act (ADEA) in *Oscar Mayer & Co.* v. *Evans,*[11] this Court referred to the EEOC's interpretation of that Section as "entitled to great deference." 60 L. Ed. at 619, *citing Griggs* v. *Duke Power,* 401 U.S. 424, 434 (1974).

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[11] _____ U.S. _____ 99 S. Ct. 2066, 60 L. Ed. 609 (1979).

The EEOC has taken the consistent positions that a charge is "filed" with it on the day it is received, without regard to the intervening deferral period; and that so long as a charge is actually received by it within 300 days of the alleged discrimination, it is deemed filed no later than the 300th day. The currently applicable EEOC regulations at 29 C.F.R. §1601.13(a) reads:

> the timeliness of a charge shall be measured for the purpose of satisfying the filing requirements of section 706(e) of Title VII by the date on which the charge is received by the Commission.

This interpretation is consistent with the administrative policy followed by EEOC from its inception. While EEOC does not begin to process a charge until the state agency has had sixty days of exclusive jurisdiction, it treats all charges received by the 300th day as having been filed within the limitations period.

In the copy of its Regulations, attached as an Exhibit to the Legislative History of the Equal Employent Opportunity Act of 1972, the following 1968 provision is found:

> §1601.12 Referrals to State and Local Authorities
>
> In cases where the document is filed with the Commission more than 150 days following the alleged act of discrimination but less than 210 days therefrom, the case shall be deferred pursuant to procedures set forth above: Provided, however, That unless the Commission is earlier notified of the termination of the State or local proceeding, the Commission will consider the charge to be filed

with the Commission on the 209th day following the alleged discrimination and will commence processing the case.

33 F.R. 16408, (1968). The Commission's interpretation has been unvarying, although embodied in a succession of regulations, and is therefore entitled to great deference by this Court. *Oscar Mayer & Co.* v. *Evans,* 60 L. Ed. at 619.

C. *A Restrictive Interpretation Of §706(e) Is Contrary To Legislative Purposes.*

There is no evidence that Congress considered the public interest in the enforcement of Title VII secondary to the goal of quick administrative action. Indeed, the record points to a recognition that, while delays in the system were unfortunate, fulfillment of Title VII goals was the first priority.

Either the 240 or 180 day limitation urged by Mohasco would significantly interfere with vindication of Title VII rights and would contravene this Court's policy against "engraft[ing] on the statute a requirement which may inhibit the review of claims of employment discrimination in the federal courts." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 798-799 (1973).

Workers in states with deferral agencies have rightfully relied on those time limits for filing which EEOC deems appropriate. Courts have repeatedly referred to the fact that the average Title VII plaintiff is without counsel and education. But even a literate person such as respondent in this case cannot be expected to do more than consult the administrative agencies for

advice.[12] Had he inquired of the state and federal agencies serving his community as he did, (Silver worked in Amsterdam, New York; and the closest office of EEOC is in Buffalo and the State Division in Albany), he would have *correctly* been told that he was required to file with the State Division within one year from the date of his discharge,[13] and that he was required to file with EEOC within 300 days (as EEOC's regulations interpret the statute). Under those circumstances, what in the legislative history, or what possible construction of the statutory provision, justifies denial to him of access to the federal court?

The response by proponents of a restrictive reading of Section 706(c) is, anomalously, "equity": why should Silver, or any resident of a deferral state, have a longer EEOC filing time than do residents of non-deferral states? The simple answer is that by statute, and administrative rule, they have been led to believe that they do.

"Diligence" is another catchword used to favor restriction. Unquestionably, 180 days, 240 days, or 300 days are in themselves severely restrictive when measured against the average statutes of limitations for

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[12] The District Court mistakenly and without any support in the Record, stated that Silver was represented by counsel at some point during the proceedings before EEOC. (Cert. Pet. App. A11). Silver's letter to the EEOC (App. 3-5) is clearly his own work; his District Court complaint was filed *pro se.*

[13] New York Executive Law §297(5) (McKinney Supp. 1977). Time limitations for filing employment discrimination claims with state agencies range from Utah's 30 days to California's one year, with a possible 90-day extension.

bringing of other civil actions. Both by enlargement of the original filing times from 90 to 180 days in nondeferral states and from 210 to 300 days in deferral states, and by express approval of judicial decisions that provided liberal reading of the earlier filing requirements, Congress, in 1972, defined the diligence required for access to federal remedy. The Conference Comittee Report of the 1972 amendments stated:

> Court decisions [which] have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law [are] not intended [to] be in any way circumscribed by the extension of the time limitations in this subsection [§706(e)]. Existing case law . . . and other interpretations of the courts maximizing the coverage of the law are not affected.

Section-by-Section Analysis of the H.R. 1746, *reprinted in* 3 Legislative History of the Equal Employment Opportunity Act of 1972, at 1846.

Consideration of the requirements imposed upon a deferral state resident, even with the most liberal interpretation of the statute, overcomes any sense that he is given a "bonus". An aggrieved person in a deferral state must make his way through three procedural stages before he has a right to sue in the federal court: he must have his claim considered by a state or local agency, regardless of its level of expertise; his claim must then be considered by the EEOC, with the possibilitiy of blind adoption of the state finding; he must wait the statutorily established time before he can obtain a

"right-to-sue," and once he has received the "right-to-sue," he has a limited time within which to file a complaint in the District Court. It is inconceivable that Congress intended to impose any greater standard of diligence than the statutory scheme now demands.

D. *This Court's Decision In Oscar Mayer & Co.* v. *Evans Supports The Decision Of The Second Circuit.*

This Court's recent decision in *Oscar Mayer & Co.* v. *Evans, supra,* further supports the result reached by the Second Circuit in this case. This Court, in construing Section 14(b) of the ADEA characterized it as patterned after, and virtually *in haec verba* with, Section 706(c) of Title VII. The Court emphasized the distinction between 14(b) which, as does Section 706(c), insures the statutory purpose of allowing a state or local agency the first opportunity to resolve complaints of employment discrimination, and Section 626(d) and (e), the ADEA counterpart of Section 706(e), which function as a limitation against stale claims. In holding that a plaintiff's failure to file with the state agency within the state statute of limitations could not deprive a plaintiff of a *federal* remedy, the Court said:

> The ADEA's limitations periods are set forth in explicit terms in 29 U.S.C. §§626(d) and (e). Sections 626(d) and (e) adequately protect defendants against stale claims. *We will not attribute to Congress an intent through §14(b) to add to these explicit requirements by implication and to incorporate by reference into the ADEA the various state-age discrimination statutes of limitations.*

60 L. Ed. at 619-620.

This Court has thus directed that deferral provisions of ADEA (and by clear implication, those of Title VII) not be construed as to defeat the substantive protections which both Acts afford victims of discrimination.

II. Assuming *Arguendo* That Section706(e)Is Held To Require Filing In Deferral States In Fewer Than 300 Days, Equitable Principles Must Be Applied To Prevent Loss Of Access To The Federal Courts.

Respondent's position is that the deferral procedures followed by EEOC in this case are consistent with the Commission's power to adopt regulations to implement Title VII, but that, even if the procedure as applied in this case is not valid, complainants who have made reasonable efforts to invoke their Title VII rights should not be barred from the opportunity to seek enforcement of those rights. Courts have recognized that a tolerant attitude toward procedural error is particularly appropriate because of Title VII's remedial purpose and the nature of its intended beneficiaries.

Thus, Title VII time limitations should be treated as statutes of limitation rather than as jurisdictional prerequisites.[14] Acceptance of this view will permit courts

[14] Terminology used in referring to Title VII's time periods has varied: some cases use "jurisdictional"; others refer to the time periods as "statutes of limitations." The lack of consistency is evident from comparison of, *e.g.*, *United Air Lines* v. *Evans*, 431 U.S. 553, 560 (1977), *International Union of Electrical Workers* v. *Robbins & Myers*, 429 U.S. 229, 240 (1976) with *United Air Lines, Inc.* v. *McDonald*, 432 U.S. 385, 392 and n. 11 (1977), and *Occidental Life Insurance Company* v. *EEOC*, 432 U.S. 355, 371-72 (1977).

more flexible construction, and will prevent the loss of valuable rights to the employee who becomes victim of bureaucratic tangle.[15] In *Occidental Life Insurance Company* v. *EEOC*, 432 U.S. 355 (1977), this Court, in discussing the issue of what time limitation, if any, should be imposed on the EEOC to bring suit against a private employer, commented upon the time limitation periods of Title VII:

> The fact that the only *statute of limitations* discussions in Congress were directed to the period preceding the filing of an initial charge is wholly consistent with the Act's overall enforcement structure--a sequential series of steps beginning with the filing of a charge with the EEOC. Within this procedural framework, the benchmark, for purposes of a *statute of limitations,* is not the last phase of the multi-stage scheme, but the commence-

[15] "A case of employment discrimination may require a party to refer to the United States Code for the first and only time in his life. An intelligent but isolated reading of section 706(e) could easily lead one to believe that 300 days is the time limitation for filing an initial claim with the EEOC. A complainant should not be penalized for Congressional ambiguity, or because he does not possess the reading ability of one trained in statutory interpretation. This indeed is the level of skill required to find the 'hidden' 240-day limitation advocated by the district court in *Silver.*" Schaff, *Title VII: Timely Filing Requirement in Deferral States Is Satisfied When the Initial Complaint Is Received by EEOC Within the 300-day Limitation of* § 706(e), 55 N.Dame Lawyer (to be published April 1980).

ment of the proceeding before the administrative body.

Id. at 372 (emphasis added) *see also Burnett* v. *New York Central Railroad Company,* 380 U.S. 424 (1965).

Employers who complain of the possibility of "stale" claims in deferral states can, in fact, show no prejudice by operation of the procedures used in this case. Whether Mohasco received notice of Silver's complaint through the State Division rather than EEOC, it cannot complain of lack of notification.[16] No employer with a sufficient number of employees to be within EEOC jurisdiction should be able to assert that it has destroyed personnel records within one year. Mohasco's notification from EEOC, *after* the 60 day deferral period to the State Division expired, was less than one year from the date of Silver's termination. (App. 17). Mohasco could not show that it was prejudiced by the procedures followed in this case. Indeed, if Silver had filed only with the State Division, within its one year statute, Mohasco would have received later notice than it did.

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[16] Notice by EEOC to an employer of charges filed with EEOC was not mandatory prior to the 1972 amendments. *Compare* P.L. No. 92-261, 1972 U.S. Cong. & Admin. News, p. 124, *with* P.L. No. 88-352, 1964 U.S. Cong. & Admin. News, pp. 309-311.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Second Circuit Court of Appeals be affirmed in all respects.

Respectfully submitted,

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FOR ARGUMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. 79-616

MOHASCO CORPORATION,
Petitioner,

vs.

RALPH H. SILVER,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER MOHASCO CORPORATION

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TABLE OF AUTHORITIES

Cases.

Statutes.

Regulations.

Legislative History.

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REPLY BRIEF FOR PETITIONER MOHASCO CORPORATION

I

The United States and the Equal Employment Opportunity Commission, as *amici curiae* (hereinafter referred to collectively as the "Solicitor General") argue that, in a deferral state, the applicable state limitations period cannot *shorten* the 180-day filing period provided for in § 706(e).[1] (Sol. Gen. Br. 39 n. 15).

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1 42 U.S.C. § 2000e5(e) (hereinafter referred to as "§ 706 (e)") of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter referred to as "Title VII").

Mohasco agrees with this. It is clear that a state may not shorten the period within which a complainant must file with the EEOC by establishing a state limitations period of *less* than 180 days. *See Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1232-33 (8th Cir. 1975) *(en banc); cf., Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 60 L.Ed.2d 609 (1979).

However, citing the current regulations of the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC"), specifically 29 CFR § 1601.13(d)(2)(iii) (1979), the Solicitor General also argues that applicable state limitations periods can extend § 706(e)'s filing period for any length of time up to 300 days (Sol. Gen. Br. 38-41). With respect to this assertion, Mohasco respectfully submits that the conclusion reached by an *en banc* Eighth Circuit in *Olson* that Title VII sets very specific *federal* limitations periods which *are not at all affected* by state limitations periods not only makes a great deal more sense than the Solicitor General's position as a practical matter, but also fully comports with the applicable statutory language. Thus, § 706(e) requires each complainant, in order to preserve his *federal* rights, to file within 180 days. In a non-deferral state, the complainant must file with the EEOC within 180 days. In a deferral state, the complainant must file with the 706 Agency within 180 days, but then is permitted 300 days within which to "file" his charge with the EEOC.[2] The "extra" 120 days for filing with the EEOC granted by § 706(c)[3]

2 The Solicitor General Notes that *Olson, supra*, and *Geromette v. General Motors Corp.,* 609 F.2d 1200 (6th Cir. 1979) involved state limitations periods of less than 180 days. However, the scholarly decision of Judge Schwarzer in *Wiltshire v. Standard Oil Co. of California,* 447 F. Supp 756 (N.D. Cal. 1978), as well as the opinion in *Bittner v. Combustion Engineering,* 19 FEP Cases 1295 (N.D. Cal. 1979), both involved cases arising in California, which, like New York, has a one-year limitations period (California Fair Employment Practice Act, California Labor Code § 1422 (Deering)), and both cases applied the *Olson* analysis.

3 42 U.S.C. §2000e-5(c) (hereinafter referred to as "§ 706(c)").

to a complainant in a deferral state is provided to permit the exhaustion of *state* remedies before resorting to *federal* remedies, and is necessary because of § 706(c)'s prohibition against the "filing" of a charge with the EEOC within the deferral period. (Pet. Br. 9-24; EEAC Br. 21-34).

As stated by the court in *Wiltshire, supra,* 447 F. Supp. at 759-60:

> "Limitations periods, moreover, are 'primarily designed to assure fairness to defendants' by protecting them from stale claims. . . .The limitation period in Section 706(e), even though part of remedial legislation, is no exception to this rule. . . .In adopting Section 706(e), Congress determined that defendants in non-deferral states are to be protected from claims arising more than 180 days prior to filing. The mere fact that an employer may be located in a deferral state does not justify a court's expanding this period to 300 days and requiring the defendant to respond to claims arising more than 180 days prior to any filing.
>
> "That the statute provides claimants in deferral states with an additional 120 days in which to file with the *EEOC* does not affect this reasoning. That period of time, as explained by Senator Dirksen, is designed to allow the claimant to pursue his state remedy as a condition precedent to his filing with the EEOC. (See pp. 758-759 above) It was inserted into the legislative compromise 'to keep primary, exclusive jurisdiction in the hands of the State Commissions for a sufficient period of time to let them work out their own problems at the local level.' Remarks of Senator Dirksen, 110 Cong.Rec. 13087(1964). The purpose underlying this section was to facilitate, in the interest of comity, the resolution of disputes at the local or state level by providing time for the 706 agency to process the claim without jeopardizing federal rights. It was not to extend by 120 days the

time for assertion of those federal rights.[4]"

(Citations omitted; footnote renumbered.)

This analysis, it is submitted, sufficiently disposes of the position taken by the Solicitor General that it would be inconsistent with the policy of deference to state procedures to require a complainant, as a prerequisite to invoking his federal rights, to file with the state within a federally imposed limitations period shorter than 300 days. (Sol. Gen. Br. 15, 38-41).

However, if this Court were to reject *Olson's* conclusion that a complainant in a deferral state is required to file a charge with the 706 Agency within 180 days, then it is Mohasco's position that a charge received by the EEOC more than 180 days after the alleged discriminatory act can be viewed as timely "filed" only if the complainant thereafter institutes timely state proceedings within the deferral period. This result is required because § 706(c) prohibits the EEOC from "filing" a charge until the deferral period has expired, and a complainant is *only* entitled to § 706(e)'s 300-day limitations period if he has "initially instituted" state proceedings.[5] This principle is

4 "That the 120 days period was intended only to give time to exhaust state or local remedies is confirmed by the fact: (1) that a similar period is provided for exhaustion of those remedies before the EEOC may file a charge during the first year of operation of 706 agency (Sec. 706(c)), and (2) that once the 706 agency has terminated its proceeding, the claimant has only thirty days within which to file with the EEOC, even if the result is to give him less than the full three-hundred days. (Sec. 706(e)) Inasmuch as the 120 day add-on period in a deferral state can thus be cut short by action of the 706 agency after a claim is timely filed, it makes little sense to grant a claimant its full benefit on the strength of his earlier failure to make a timely filing."

5 *Oscar Mayer* would support the proposition that the EEOC's mailing of a charge to the 706 Agency "commences" state proceedings for purposes of calculating § 706(c)'s deferral period. However, § 706 (e) does not provide any basis for deeming a 706 Agency proceeding to have been "instituted" at any time earlier than the date it is instituted under state law. For that matter, the very fact that § 706(c) has such a deeming provision, which by its express terms applies only with respect to calculating the deferral period pursuant to § 706(c), and § 706(e) has no such provision makes it pellucid that it is state law that determines when the 706 Agency proceedings are "instituted" for § 706(e) purposes. This is particularly clear in view of the underlying statutory pattern of deferring EEOC action to permit similar actions first to be undertaken by 706 Agencies. *Love v. Pullman Company,* 404 U.S. 522, 526 (1972); *Doski v. M. Goldseker,* 539 F. 2d 1326, 1330 (4th Cir. 1976).

It is undisputed that Respondent Ralph H. Silver (hereinafter referred to as "Silver") first instituted his New York State Division of Human Rights (hereinafter referred to as "Human Rights Division") proceedings for purposes of New York law by filing his verified complaint with that agency on August 12, 1976, 349 days after his termination. Because that date is well beyond even the 300-day limitations period, Silver could not possibly have "initially instituted" state proceedings, because no timely "filing" could have been made with the EEOC at that time.

implicitly recognized, albeit only to a slight extent, in the EEOC regulation which permits the EEOC to "process" complaints submitted between 180 and 300 days after the alleged unlawful discriminatory practice *only* if the charge is still timely under state law (29 CFR § 1601.13 (d)(2)(iii) (1979)).

The Solicitor General's position, thus, not only lacks statutory support, but also leads to an extremely complicated filing scheme. The irony of this is that the Solicitor General criticizes Mohasco's alternative construction of Title VII's filing provisions (based on *Doski,* v. M. Goldseker, 539 F.2d 1326 (4th Cir. 1976)) as "cumbersome" and "yielding a speculative limitations period in every case" (Sol. Gen. Br. 17). Certainly, the *Olson* reading of the statutory limitations periods is not subject to such criticism. However, should this Court not find the *Olson* reading persuasive, the result reached from following the *Doski* reading, which fully comports

with the statutory language in stark contrast to the Solicitor General's interpretation (Pet. Br. 26-38), is less "cumbersome" and "speculative" than the result reached by following the Solicitor General's interpretation. The results that flow naturally from the *Doski* interpretation of § § 706(c) and (e) cannot be criticized as unworkable. As stated by Judge Meskill in dissent below:

> "As a practical matter, a person who complains to the EEOC within 180 days of an alleged illegal employment practice can be sure of neither tripping on the deferral threshold nor bumping against the limitations ceiling. Regardless of whether the relevant state has created an agency to which deferral is necessary, and regardless of how long any such agency has been in existence, and regardless of how quickly any such deferral agency terminates its proceedings, the complaint will be timely."
>
> (Cert. Pet. App. A39).

Accord, Moore v. Sunbeam Corporation, 459 F.2d 811, 829-30 (7th Cir. 1972).

II

Silver and the Solicitor General both claim that this Court's decision in *Oscar Mayer, supra,* supports the result reached by the majority in the Second Circuit below (Resp. Br. 23-24; Sol. Gen. Br. 21-23).

Oscar Mayer dealt with the timeliness of a charge filed under the Age Discrimination in Employment Act of 1967 (hereinafter referred to as "ADEA"). In that case, the Court held:

> ". . .that § 14(b) [of the ADEA] mandates that a grievant not bring a suit in federal court under § 7(c) of the ADEA until he has first resorted to appropriate state administrative proceedings. We also hold, however, that the grievant is not required to commence the state proceedings within time limits specified by state law."
>
> *(Oscar Mayer, supra,* 441 U.S. at ____, 60 L.Ed.2d at 614.)

It is true that ADEA § 14(b) is patterned after and is virtually *in haec verba* with § 706(c) of Title VII.

Similarly, it is correct that *Oscar Mayer* would support the proposition that the EEOC's mailing of a discrimination charge to a 706 Agency "commences" state proceedings for § 706(c) deferral purposes (see *Oscar Mayer, supra,* 441 U.S. at ____, 60 L.Ed.2d at 618-19). Furthermore, *Oscar Mayer*'s holding that an aggrieved person is not required to "commence" timely state proceedings in order to be entitled to maintain a federal suit would appear to apply by analogy to a Title VII action arising in a deferral state where the complainant has "filed" with the 706 Agency within 180 days and with the EEOC within 300 days. Indeed, *Olson* anticipated the *Oscar Mayer* decision by holding precisely that. *Olson, supra,* 511 F.2d at 1232.

Beyond this, however, it is unclear how far *Oscar Mayer*'s conclusions with respect to the ADEA can be applied to Title VII because the ADEA differs from Title VII in two vitally important ways.

First, the ADEA has no provision analagous to the one contained in § 706(e) that the extended 300-day filing period is available *only* to an aggrieved person who has *initially instituted* state proceedings. In fact, ADEA § 7(d) makes it clear that the ADEA *automatically* extends a complainant's time to initiate federal agency proceedings if the complainant is in a deferral state. In spite of this obvious and striking difference in statutory language, the Solicitor General suggests that § 706(e) should be read the same way as ADEA § 7(d). (Sol. Gen. Br. 42-43). Mohasco respectfully submits that where Congress

has adopted two statutes that are similarly worded, it should be presumed that Congress intended such major differences in language as may exist to mean something. In this context, the language difference between § 706(e) and ADEA § 7(d) clearly suggests that Congress chose to extend Title VII's 180-day limitations period to 300 days *only* for those individuals who "initially instituted" state proceedings, rather than automatically providing the extended filing period to all who reside in a deferral state as was done in the ADEA. As explained in Mohasco's Brief, since under no reasonable interpretation of § 706(e) can Silver be viewed as having "initially instituted" state proceedings, Silver clearly was not entitled to the 300-day filing period. (Pet. Br. 24-29). Thus, even if Silver's charge is deemed to have been "filed" by the EEOC when it was received 291 days after his termination, the charge was untimely.

Second, Title VII provides for sequential state and federal jurisdiction in contrast to ADEA's concurrent state and federal jurisdiction *(Oscar Mayer, supra,* 441 U.S. at ___ , 60 L.Ed.2d at 616). One court, at least, has viewed this difference as limiting the application of *Oscar Mayer* in a Title VII action. In *Albano v. General Adjustment Bureau, Inc. (GAB),* 478 F. Supp. 1209 (S.D. N.Y. 1979), a Title VII plaintiff submitted a charge to the EEOC within 180 days after the alleged unlawful discriminatory practice. The EEOC forwarded the charge to the New York City Commission on Human Rights ("CCHR"), which requested the plaintiff to file a formal CCHR complaint. The plaintiff chose not to do this, and never initiated proceedings before either the CCHR or the Human Rights Division (which, pursuant to New York law, has concurrent jurisdiction with the CCHR). In this situation, the court said:

> "The plaintiff contends that the reasoning of *Oscar Mayer* applies as much to Title VII as it does to the ADEA and that, as a result, her initial failure to file with the state as required by section 706(b) was cured by her filing with the CCHR after commencement of the instant action. This Court cannot agree. While the purposes of both the ADEA and Title VII are, in many ways, very similar, the procedural mechanisms and time strictures established for them vary greatly. As the Supreme Court noted in *Oscar Mayer,* ___ U.S. at ___, 99 S.Ct. at 2071-72, Title VII, unlike the ADEA, which provides for concurrent federal and state agency jurisdiction, provides for sequential jurisdiction whereby the person aggrieved must first file with the state antidiscrimination agency before being able to file with the EEOC. As a result, only after the appropriate state agency has been given its required opportunity to resolve the claim does the EEOC obtain the subject matter jurisdiction necessary so as to proceed with its investigation and issue a 'right to sue' letter. If the EEOC acts, as it did in the instant action, before the state agency has had such an opportunity, it has done so in derogation of section 706(b) and without the requisite jurisdiction. Such a failing cannot be cured by a subsequent filing with the state."
>
> *(Albano, supra,* 478 F. Supp. 1212-13; footnote omitted.)

Similarly, it is only after the expiration of § 706(c)'s deferral period that the EEOC can deem a charge to be "filed". *Love, supra,* 404 U.S. at 526, note 5. If § 706(e)'s extended limitations period expires before that "filing" date, the EEOC never obtains subject matter jurisdiction over the charge because no timely charge was ever "filed" with the EEOC.

III

The Solicitor General asserts that Congress enacted a new § 706 in 1972, and that, therefore, it is the legislative intent of the 1972 Congress that should control the interpretation of § § 706(c) and (e). (Sol. Gen. Br. 36-38).

This curious assertion appears to be based on the premise that the 1972 Congress *considered* making substantial changes in § 706. Thus, argues the Solicitor

General, the relatively minor modifications to § 706 (primarily consisting of extending by 90 days the normal and extended filing periods provided by § 706(e)) *actually* made by Congress should be viewed as a *reenactment* of that section, rather than a mere amendment. This argument is an obvious attempt by the Solicitor General to preclude consideration of the legislative intent of the 1964 Congress which in fact enacted Title VII.

In support of this position, the Solicitor General (Sol. Gen. Br. 37) quotes from *Teamsters v. United States,* 431 U.S. 324, 354 n.39 (1979). In fact, if the *Teamsters* statement is relevant at all, it stands for the opposite proposition, since the Court said:

> ". . .More importantly, the section of Title VII that we construe here, § 703(h), was enacted in 1964, not 1972. The views of members of a later Congress, concerning different sections of Title VII, enacted after this litigation was commenced, are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls."
>
> *(Teamsters, supra,* 431 U.S. at 354 n.39.)

Both the Solicitor General (Sol. Gen. Br. 35) and Silver (Resp. Br. 17) similarly mischaracterize a statement from *Occidental Life Insurance Co. v. EEOC,* 432 U.S. 355, 365 (1977) in an attempt to bolster the strength of the Section-by-Section Analysis of the 1972 amendments, 118 Cong. Rec. 7564, on which they both rely so heavily. An analysis of *Occidental* leads to the conclusion that this Court did not hold that the Section-by-Section Analysis is, in and of itself, the "final and conclusive confirmation of the meaning" of either "the statute" (Resp. Br. 17) or "the 1972 amendments" (Sol. Gen. Br. 35). Rather, with respect to § 706(f)(1), the court found the Section-by Section Analysis to be the last piece of evidence of an unambiguous legislative intent which foreclosed one argument concerning the proper interpretation of § 706(f)(1). The lack of relevance of this statement to the instant matter is clear.

It is submitted that the entire legislative history of Title VII, when viewed as a whole, supports Mohasco's interpretation of § § 706(c) and (e). *See* Pet. Br. 29-38; EEAC Br. 13-17; 29-34.

IV

Silver asserts that, if this Court holds Silver's charge is otherwise untimely, it should consider the statutory time limits not as "jurisdictional prerequisites" (so that compliance with them is mandatory), but as "statutes of limitation" (which are subject to equitable tolling) and hold Silver's charge to have been timely filed. (Pet. Br. 24-26). The Solicitor General similarly argues that if this Court concludes the EEOC's interpretation of Title VII's time limitations is incorrect, that conclusion should be applied prospectively only, and not to Silver or similarly situated complainants. (Sol. Gen. Br. 43, n. 17).

It is certainly true that courts have variously described Title VII's time limits as "jurisdictional prerequisites" and "statutes of limitation". *See e.g., Smith v. American President Lines, Ltd.,* 571 F.2d 102 (2d Cir. 1978); and *Daughtry v. King's Department Stores, Inc.,* 608 F.2d 906 (1st Cir. 1979). Here, however, as was the case in *Smith* and *Daughtry,* the Court is not presented with any facts that would justify "tolling" even if such were permissible, and thus the Court need not decide this important question at this point.

Since this Court's decision in *Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976), those courts which have held that § 706(e)'s limitations periods are subject to "tolling", have held "tolling" to be appropriate only: (1) during the pendency of an action before a state court that had subject matter jurisdiction, but which was the wrong forum under state law; (2) to defer the commencement of the running of the 180-day period until the complainant knew, or should have known, the facts that would give rise to his Title VII action and where

it is established that the defendant has affirmatively misled the complainant; and (3) when the EEOC misleads a complainant as to the nature of his Title VII rights. *Chappell v. Emco Machine Works Co.,* 601 F.2d 1295, 1302-03 (5th Cir. 1979) (citing cases).

Here, Silver clearly has not alleged any set of circumstances justifying a "toll" under any one of these rationales, assuming, *arguendo,* that "tolling" of § 706(e)'s limitations period is ever appropriate. In fact, neither Silver nor the Solicitor General advances any equitable rationale for tolling the limitations period based on the record facts in this case. (Resp. Br. 24-26; Sol. Gen. Br. 24). Rather, both seem satisfied to presumptuously state Mohasco can claim no prejudice if this Court holds Silver's claim to be timely regardless of the absence of equitable grounds. [6]

6 With respect to the prejudice question, Mohasco respectfully refers the Court to Judge Meskill's discussion of the EEOC procedure followed in this case, where he said:

> "Although the majority assures us that the interpretation adopted today 'does not countenance the filing of stale claims,' I respectfully suggest that when Congress bestows new rights and remedies on some persons and imposes new obligations and liabilities on others, its judgment regarding how and when claims are to be asserted and preserved ought not to be lightly disregarded. 'Even though a statute of limitations may "permit a rogue to escape," the legislative commands must be respected.' [Citations omitted.] Second, to the extent that the repose granted by Congress to potential defendants has been delayed, they have been adversely affected by the EEOC practice. Finally, the language of the statute indicates that the result reached today was simply not intended by the authors of Title VII. Deference to agency interpretation is appropriate only when consistent with deference to the intent of Congress.
>
> "Referring to the many 'procedural requirements and time limitations that must be met before a claim of discrimination can be brought to the attention of a federal court,' and *citing Love v. Pullman, supra,* we have remarked:
>
> > The procedures thus mandated exist not for their own sake, but rather in futherance of substantive purposes. . . .[T] he rigid insistence on meticulous observance of technicalities *unrelated to any substantive purpose* is inappropriate.
>
> *'Weise v. Syracuse University,* 522 F.2d 397, 411, 412 (2d Cir. 1975) (citations omitted). It must be remembered, however, that where, as here, a procedural requirement *does* further a substantive purpose, it is judicial disregard of the statutory design that is inappropriate."
>
> (Cert. Pet. App. A43 - A44; citations omitted; footnote omitted.)

Silver's only conceivable argument for tolling is that the EEOC somehow misled him as to the time limits within which he had to file. This assertion, however, is belied by the following statement contained in Silver's charge-letter: "I learned from Mrs. Lyn Miller *today* that I have only 300 days in which to file a claim". (App. 3; emphasis added). Silver's charge-letter is dated June 10, 1976, 286 days after his employment with Mohasco terminated, and well after § 706(e)'s 180-day limitations period had expired. Thus, if this Court accepts the *Olson* interpretation of § 706(e) requiring in all instances a "filing" within 180 days, the EEOC's "advice" occurred at a time when Silver could no longer file a valid charge. It would seem clear that the EEOC cannot make timely an untimely discrimination charge merely by telling a complainant that he still has a few days in which to "file".

Furthermore, even if the EEOC gave the advice Silver attributes to it, the EEOC did not say Silver had 300 days in which to "submit" his charge to the EEOC, but that he had to "file" his charge within 300 days. Thus, even if this Court does not accept the *Olson* interpretation of § 706(e), this "advice" was perfectly proper under the interpretation attributed to §§ 706(c) and (e) by *Doski,*

supra. Under the *Doski* rationale, Silver could have "filed" a timely complaint with the EEOC if, but only if, he submitted a charge to the EEOC and also instituted proceedings with the Human Rights Division which terminated before the 300-day period expired.

In any event, it is clear that the EEOC's advice did not cause Silver any injury by misleading him into taking action he would not otherwise have taken, or into delaying any action he would otherwise have taken sooner. Thus, this Court need not decide whether § 706(e)'s limitations period is jurisdictional or a statute of limitations because neither Silver nor the Solicitor General has presented any facts which would justify a "toll" even if tolling were held to be appropriate. *Smith, supra,* 571 F. 2d at 108-111. Similarly, there is no reason for this Court to decline to apply the interpretation established by this case to Silver.

As stated recently by the Eighth Circuit in an ADEA case:

> "Noticeably missing from the record are any allegations that would justify, on an equitable basis, taking the limitations period protection away from [the defendant] American Wheel and Brake. Equity, in a pure sense, is as Justinian states, 'to live honestly, to harm nobody, to render every man his due. 'Institutes 1, 1, 3. We obviously harm Larson if we bar his cause of action in this case; on the other hand, we harm American Wheel and Brake if we allow the cause of action. Thus, in balance, it appears that the tipping of the scales must be to 'render every man his due.' "
>
> *(Larson v. American Wheel and Brake, Inc.,* 610 F. 2d 506, 510 (8th Cir. 1979).)

Mohasco asks for no more than this.

CONCLUSION

For all of the foregoing reasons, as well as for those reasons set forth in our original brief, we respectfully request the Court to reverse the decision of the Second Circuit Court of Appeals and remand this case to the district court with directions to dismiss all aspects of this lawsuit relating to any claims of discrimination by Mohasco alleged to have occurred more than 180 days or, alternatively, more than 300 days before Silver's complaint was "filed" with the EEOC.

Respectfully submitted,

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No. 79-616

In the Supreme Court of the United States

OCTOBER TERM, 1979

MOHASCO CORPORATION, PETITIONER

v.

RALPH H. SILVER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A23-A44) is reported at 602 F.2d 1083. The opinion of the district court (Pet. App. A1-A21) is unofficially reported at 19 Fair Empl. Prac. Cas. 677.

JURISDICTION

The judgment of the court of appeals was entered July 18, 1979. The petition for a writ of certiorari was filed on October 15, 1979, and was granted on December 10, 1979, limited to the first question presented in the petition. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a charge of discrimination that is received by the Equal Employment Opportunity Commission 291 days after the alleged discriminatory occurrence and is immediately referred to the appropriate state agency is timely under Section 706 of the Civil Rights Act of 1964, as amended.

STATUTES AND REGULATIONS INVOLVED

Section 706(c) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(c), provides:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Section 706(e) of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(e), provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local

law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The relevant regulation of the Equal Employment Opportunity Commission, 29 C.F.R. 1601.12(a) and (b) (1977) as in effect when this case arose, provided in pertinent part:

> (a) In order to give full weight to the policy of section 706(c) of the Act, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to an appropriate 706 Agency * * * It is the experience of the Commission that because of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of the protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities and thereby avoid the accidental forfeiture of important Federal rights.
>
> (b) The following procedures shall be followed with respect to cases arising in the jurisdiction of "706 Agencies" to which the Commission defers as further defined in paragraph (c) of this section:
>
> (1) Any document, whether or not verified, received by the Commission as provided in § 1601.7, which may constitute a charge cognizable under Title VII, shall be deferred to the appropriate 706 Agency, as further defined in paragraph (c) of this section, as provided in the procedures set forth below.
>
> * * * * *
>
> (1)(v) * * *
>
> (A) In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th day following the alleged act of discrimination, without notification to the Commission of such termination, the Commission will consider the charge to be filed with the Commission on the date the person making the charge was notified of the termination.

29 C.F.R. 1601.13 (1979), currently in force, provides in pertinent part:

> (a) The timeliness of a charge shall be measured for purposes of satisfying the filing requirements of section 706(e) of Title VII by the date on which the charge is received by the Commission.
>
> * * * * *
>
> (c) Deferral policy. (1) In order to give full weight to the policy of section 706(c) of the

Act, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission where there is no evidence that such allegations were earlier presented to an appropriate 706 Agency. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. * * *

* * * * *

(d) * * *

(2) For purposes of satisfying the filing requirement of section 706(c) of Title VII, the Commission shall assume jurisdiction over a document described in paragraph (d)(1) of this section as follows:

* * * * *

(iii) Where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within 300 days and within the period of limitation of the appropriate 706 agency, the Commission shall process the document in accordance with paragraph (d)(1) of this section and shall assume jurisdiction 60 (or where appropriate, 120) days after the 706 agency proceedings have been commenced, except that where the Commission is earlier notified of the termination of the State proceedings, it shall immediately assume jurisdiction upon receipt of such notice.

INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission is the agency established by Congress to administer, interpret, and enforce federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* Petitioner challenges Commission regulations and procedures, in use for over 12 years, interpreting and applying two procedural provisions of Title VII that concern the jurisdiction of the Commission to consider and act on allegations of discrimination.

STATEMENT

1. The facts relevant to the issue before the Court are not in dispute. Respondent was discharged from employment by petitioner on August 29, 1975. On June 15, 1976—291 days after his discharge—the Equal Employment Opportunity Commission (EEOC) received a letter from respondent charging that he had been discriminatorily discharged by petitioner because of his religion (Pet. App. A2). Immediately upon receiving respondent's letter, the EEOC mailed it to the New York State Division of Human Rights, in accordance with EEOC regulations and procedures. See 29 C.F.R. 1601.12(b) (1977), pages 4-5, *supra.* New York has a one-year statute of limitations for filing charges with the Human Rights Division, N.Y. Exec. Law § 297(5) (McKinney Supp. 1972-1979), and the complaint was therefore timely under state law.

An EEOC memorandum sent to the Human Rights Division with petitioner's letter stated: "The Commission will automatically file this charge at the expiration of the deferral period, unless we are notified before the expiration of that period that your agency has terminated its proceedings" (Pet. App. A6-A7). On August 20, the EEOC notified petitioner that respondent had filed a charge of employment discrimination (Pet. App. A7), and informed respondent of that notification (Pet. 4). On February 9, 1977, the Human Rights Division determined that there was not probable cause to believe petitioner had discriminated against respondent and ordered his state complaint dismissed (Pet. App. A7-A8, A26, A45-A46).[1] The EEOC concluded on August 24, 1977, that the timeliness, deferral and all other jurisdictional requirements had been met, but that there was not reasonable cause to believe respondent's charge was true (Pet. App. A8, A26, A49-A50). Respondent then filed this action on November 23, 1977 (Pet. App. A8, A26).

2. The district court dismissed the complaint, concluding that it did not have jurisdiction over the subject matter because respondent had not filed a timely charge with the EEOC (Pet. App. A1-A21).[2]

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[1] Dismissal of the state complaint was affirmed by the State Human Rights Appeal Board on December 22, 1977 (Pet. App. A47-A48).

[2] The district court also dismissed respondent's claim against individual defendants because they were not named in the charge filed with the EEOC and dismissed that portion of the complaint alleging post-charge discrimination because the charge did not assert a continuing violation (Pet. App. A3-A6, A19-A20). The court of appeals affirmed the former holding but reversed the latter (Pet. App. A27 n.7, A35-A36). These issues are not embraced by the grant of the petition for a writ of certiorari.

The court held that respondent's charge of discrimination could not be deemed to have been "filed" with the EEOC under Section 706(e) of the Act, 42 U.S.C. 2000e-5(e), prior to the expiration of the 60-day period provided in Section 706(c), 42 U.S.C. 2000e-5(c), for the state to review the charge, unless the state disposed of the charge in a shorter period of time. Because the 60-day period did not expire in this case until August 14, 1976—more than 300 days after respondent's discharge—the court held that his charge filed with the EEOC was untimely under Section 706(e), even though it had been received by the EEOC within the 300-day limitations period provided in Section 706(e) (Pet. App. A10).

The district court declined to follow the pertinent EEOC regulation, 29 C.F.R. 1601.12(b)(1)(v)(A) (1977) (see page 5, *supra*), which provided that where a complaint was submitted to the Commission more than 180 days after the alleged violation, the Commission would consider the charge to be filed with the Commission on the 300th day following the alleged discrimination. To the court (Pet. App. A18), the regulation "seem[ed] contrary to the plain, although still complicated, language" of Sections 706(c) and (e).

Thus, the district court held that a charging party "must, unless the state or local proceeding is swiftly terminated, notify the EEOC of the alleged violation at least 240 days after the date of the alleged violation if he wishes his charge to be timely" (Pet. App. A12).

3. The court of appeals reversed, one judge dissenting (Pet. App. A23-A44). Stressing the remedial nature of Title VII, and therefore eschewing "technical" or "rigid" application of its procedural requirements (Pet. App. A29-A30, citing *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979), and *Love* v. *Pullman Co.*, 404 U.S. 522 (1972)), the court held that respondent's charge was timely filed under Section 706(e) when it was initially received by the EEOC within the 300-day limitations period and that the EEOC's procedure for referring charges to local agencies for 60 days satisfied Section 706(c), even where the 60-day period expires more than 300 days after the alleged discriminatory occurrence.

The court concluded that the language in Section 706(c) providing that "no charge may be filed" with the EEOC before the expiration of 60 days after proceedings have been commenced under state or local law "simply means that the EEOC may not process a Title VII complaint until sixty days after it has been referred to a state agency" (Pet. App. A31). The court found this interpretation to be consistent with the holding in *Love* v. *Pullman Co.*, *supra*, that a

charge received by the EEOC may be held in "suspended animation" pending deferral to a state agency and that to require a second "filing" with the EEOC after the 60-day period would create additional procedural obstacles without advancing the purposes of the statute (Pet. App. A30-A31). Again relying on *Love* v. *Pullman Co.*, *supra*, and *Oscar Mayer & Co.* v. *Evans*, *supra*, the court continued (Pet. App. A31-A32; citations omitted):

> This interpretation not only serves the concern of Title VII for individual rights, but also comports with the overarching procedural scheme embodied in the statute. There is little doubt that § 706(c) is designed solely to provide state agencies with an opportunity, before the federal agency intervenes, to resolve disputes between employer and employee. Viewed in this light, it is clear that, because the charge is referred to the local agency after it is "filed" with the EEOC, appropriate respect is accorded the states. Moreover, in no sense can Title VII defendants be said to suffer prejudice or surprise under our reading of § 706(c), for the interpretation we have adopted does not countenance the filing of stale claims. In the instant case appellee had ample notice of the proceedings before the state agency, EEOC, and the district court, which occurred in the sequence envisioned by Title VII.

The court of appeals also found its interpretation of Sections 706(c) and (e) to be supported by the legislative history of the 1972 amendments to Title

VII, during which the Conference Committee "explicitly endorsed" the decision in *Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972), interpreting Title VII of the Act as originally enacted in the same fashion (Pet. App. A33-A34). Finally, the court reasoned that "considerable deference" was due EEOC's consistent interpretation of the statute in this manner throughout the preceding 10 years (Pet. App. A34).

SUMMARY OF ARGUMENT

Section 706(c) of the Civil Rights Act of 1964, as amended, provides that in a state or locality that has established an agency to consider employment discrimination complaints, no charge of discrimination "may be filed" with the Equal Employment Opportunity Commission (EEOC) until 60 days after state or local proceedings have commenced, unless the state proceedings have been earlier terminated. Section 706(e) of the Act provides that a charge of discrimination must be filed with EEOC within 180 days after the alleged discriminatory act, except that the charge must be filed within 300 days where the individual has "initially instituted" proceedings with a state or local agency.

Respondent's charge was received by the EEOC 291 days after his allegedly discriminatory firing by petitioner, and the EEOC immediately forwarded it to the appropriate state agency. Petitioner argues that the charge was untimely under Section 706(e),

even though it was received by the EEOC within 300 days, because the EEOC was precluded by Section 706(c) from formally "filing" the charge for up to the 60 days afforded by Section 706(c) for the state to consider the allegations. However, Section 706(e) is the only provision expressly dealing with the time within which the aggrieved person must file with the EEOC. There is no indication in that section that the 300 days afforded a complainant in a deferral state is implicitly reduced by whatever period (up to 60 days) is necessary to allow the state to consider the allegations pursuant to Section 706(c). Moreover, petitioner's construction of the Act would create considerable uncertainty because the timeliness of a charge in any given case would ultimately depend on whether the state agency could dispose of the complaint before the end of the 300-day period provided in Section 706(e).

Section 706(c) is intended simply "to give state agencies a prior opportunity to consider discrimination complaints," while Section 706(e) serves the usual purpose of a limitations period "to ensure expedition in the filing and handling of those complaints." *Love* v. *Pullman Co.*, 404 U.S. 522, 526 (1972). Accordingly, the natural reading of the Act is that Section 706(c) is addressed to the *EEOC*, and governs what it may treat as an effective filing date for purposes of its own consideration of the complaint, while Section 706(e) exclusively governs the time within which the aggrieved person must file with the EEOC. This straightforward reading of Section 706(e), as imposing a clear 300-day limita-

tions period in deferral states, is particularly appropriate "in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 527. To effectuate the policy embodied in Section 706(c), the federal complaint may then be "held in abeyance" (*Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 764 (1979)), or held in "suspended animation" (*Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526) pending the 60-day deferral period, just as was done by the EEOC here.

What is more, the EEOC has long taken the position that a charge of discrimination received by the EEOC within the 300-day limitations period in deferral states is timely, even where the 60-day period for deferral to the states expires more than 300 days after the alleged discriminatory act. This longstanding and consistent interpretation of Title VII by the EEOC is entitled to great deference.

Finally, and most significantly, the legislative history of the 1972 amendments, when the current Sections 706(c) and (e) were enacted, makes unmistakably clear that Congress intended that a charge filed with the EEOC within 300 days would be timely and that Section 706(c) is only a prohibition against the EEOC's taking any action on the charge during the 60-day deferral period.

There is no merit in petitioner's alternative argument that a complainant must always file with the state agency within 180 days of the alleged discriminatory act in order to invoke the protections of Title VII. Nothing in Section 706(e) so provides. Respond-

ent's charge was timely under New York's one-year limitations period when it was referred by the EEOC to the state agency on the 291st day after the alleged discriminatory occurrence. It would be inconsistent with the entire policy of deference to state procedures to require a complainant, as a prerequisite to invoking his federal rights, to file with the *state* within a *federally imposed* limitations period shorter than the 300 days Congress has established for filing with the EEOC itself in deferral states.

Moreover, as already noted, EEOC regulations in effect since 1968 have interpreted Section 706(e) and its predecessor to allow the complainant the full limitations period (now 300 days) to file with the EEOC in deferral states, irrespective of when he first filed with the state. In enacting Section 706 in 1972, Congress expressly approved the holding in *Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972), interpreting the predecessor of Section 706 as permitting a charge to be filed with the EEOC anytime within the then-applicable 210 day limitation period in deferral states, even though it had not been filed with the state within the shorter 90-day (now 180-day) period petitioner argues for here.

ARGUMENT

The issue in this case is how to reconcile two procedural provisions of Title VII of the Civil Rights Act of 1964, as amended, dealing with the filing of discrimination charges with the Equal Employment

Opportunity Commission in states where there exists a local agency authorized to grant relief. In such situations, Section 706(c) of the Act stipulates that "no charge may be filed [with the EEOC] * * * before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated." On the other hand, Section 706(e) provides that when "the person aggrieved has initially instituted proceedings with a State or local agency," any charge with the EEOC "shall be filed * * * within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated [its] proceedings * * *, whichever is earlier"—instead of the usual 180 days from the discriminatory act.

Treating the matter solely as a mathematical puzzle—in which all words must be given exactly the same meaning, regardless of all else, and internal consistency is the only criterion—it may be possible to demonstrate a logical solution which forbids effective filing of a federal charge for purposes of the 300-day time limit while the 60-day deferral period is still running. The consequence would be that, to be safe, an aggrieved person must submit his complaint to the state agency not later than 240 days after the act complained of, although he may delay and still be timely if he successfully gambles that the state proceeding will be completed in less than the 60 days

afforded by Section 706(c). But this cumbersome result[3]—yielding a speculative limitations period in every case—is not compelled by the text, is inconsistent with longstanding administrative practice, is contrary to the clear intent of Congress when the provisions were re-enacted in 1972, and is at odds with the statutory purposes of Sections 706(c) and (e). Such a complex rule would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972). In our view, all indicators point to a simpler and more straightforward rule: The person aggrieved has 300 days in which to submit his charge to the EEOC, albeit the EEOC cannot process the charge until the state agency has been afforded at least 60 days to act.[4]

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[3] The result would be even more complicated than indicated in the text. Section 706(c) provides that during the first year of operation of the state or local law, the state or local agency must be given 120, not 60 days, within which to consider the allegations of discrimination. Thus, to be safe, the aggrieved person would have to determine whether the appropriate state or local agency is in its first year of operation and, if so, to file within 180 days to allow the state up to 120 days to act.

[4] Where the state agency terminates its proceedings on the complaint within the 300-day period, however, Section 706(e) expressly requires that the person aggrieved file with the EEOC within 30 days of the termination.

A. The Statutory Text

Section 706 of the Civil Rights Act of 1964, as amended, contains only one provision expressly dealing with the time for filing charges with the Equal Employment Opportunity Commission. This is subsection (e), which by its terms allows 300 days from the date of the act complained of to file with the federal commission whenever the complainant has first sought relief from a state or local agency. The only exception mentioned is where the state proceedings are sooner concluded, in which event the federal charge must be filed thirty days thereafter. But Section 706(e) nowhere suggests that the normal allowance of 300 days is conditioned upon having filed state proceedings at least 60 days earlier. On the contrary, the provision only requires that such proceedings have been "initially instituted"—presumably at *any time* before the 300 days have run, at least when, as here, state law imposes no shorter deadline.

Plainly, if Section 706(e) stood alone, petitioner's argument would be without the slightest textual support. The problem arises only because another provision, Section 706(c), requiring initial deferral to the state agency, specifies that no federal charge "may be filed" until 60 days after state proceedings have commenced (unless sooner terminated). The question is what "filing" means in this subsection. We know from *Love* v. *Pullman Co.*, *supra*, that the provision cannot be read to render a "premature" filing with the EEOC entirely ineffective. On the contrary, that decision teaches us that, although a

charge filed with the EEOC before the person aggrieved has applied to the state agency does not authorize the EEOC to begin processing the charge immediately, it does render unnecessary a second filing with the EEOC by the aggrieved person after the state agency has been afforded 60 days to consider the complaint.[5] In short, Section 706(c) is a prohibition on premature *action* by the EEOC: for *that* purpose, the premature submission is not presently deemed "filed," but remains for a time in "suspended animation." 404 U.S. at 526. It does not follow, however, that such a filing is ineffective as it relates to the statute of limitations for an aggrieved person's submission of charges of discrimination to the EEOC.

Once it is conceded, as *Love* requires, that Section 706(c) does not prohibit "premature" submissions to the EEOC, but is *addressed to the Commission* and controls what it may treat as an effective filing for the purpose of proceeding with its own consideration of the complaint, it is reasonable to look to Section 706(e) for the purpose of determining when the *aggrieved person* may file his charge with the EEOC. Thus, the two texts can be reconciled in a way that gives Section 706(e) its natural role as the only provision that controls timeliness of a charge filed with

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[5] In *Love* v. *Pullman Co.*, the Court upheld the EEOC's longstanding practice of referring a charge of discrimination to a state agency on behalf of the aggrieved person where that person has not filed directly with the state agency before filing with the EEOC. See 29 C.F.R. 1601.13(d) (1979).

the EEOC, while, at the same time, fully recognizing the objective of Section 706(c) to afford the state agency a reasonable opportunity to resolve the complaint. Section 706(c), in this view, simply prohibits the EEOC from taking any action on the charge until expiration of the 60-day deferral period.

B. The Purposes Underlying Section 706(c) and Section 706(e)

The reconciliation just described is directly supported by the prior decisions of this Court recognizing that, although Sections 706(c) and (e) both concern themselves generally with procedures for handling discrimination complaints, the two sections serve quite different purposes. The purpose of the 60-day deferral period in Section 706(c), the Court has said, is merely "to give state agencies a prior opportunity to consider discrimination complaints." *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526; see also *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 754-756 (1979).[6] There is no indication that it was also

[6] The provision for deferral to state proceedings was inserted in the 1964 Act largely in response to the uneasiness some Senators felt about what they perceived to be "the steady and deeper intrusion of the Federal power in fields where the problem is essentially State and local in character." 110 Cong. Rec. 8193 (1964) (remarks of Sen. Dirksen). Senator Humphrey later explained the purpose of the deferral provisions added to the bill:

> First, we were concerned that States and localities be afforded every opportunity to resolve these difficult problems of racial justice by means of their own agencies and instrumentalities. In this respect it is perfectly proper to describe the substitute package as a * * * "States responsibilities bill."
>
> * * * We sought merely to guarantee that these States—and other States which may establish such programs—will be given every opportunity to employ their expertise and experience without premature interference by the Federal Government.

110 Cong. Rec. 12724-12725 (1964). The Commission's regulations as applied in this case fulfilled the objective of giving the state "every opportunity" to act "without premature interference by the Federal Government."

designed to govern the timeliness of charges filed with the EEOC.

On the other hand, Section 706(e) was designed to "ensure expedition in the filing and handling of * * * complaints." *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526. As the Court stated in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 371 (1977), "Congress did express concern for the need of time limitations in the fair operation of the Act, but that concern was directed entirely to the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator." See also *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 239-240 (1976).

The same distinction was drawn by the Court in *Oscar Mayer & Co.* v. *Evans*, *supra*, in construing the directly parallel provision of the Age Discrimination in Employment Act of 1967 (ADEA). There the Court held (441 U.S. at 754-764) that an individual may not bring a suit in federal court under the ADEA until he has resorted to appropriate state ad-

ministrative proceedings. But the Court held that Congress did not intend to require, as a prerequisite to filing a lawsuit under the ADEA, that resort to state proceedings be within whatever time period was provided under state law. The Court concluded that the only limitations periods in the ADEA are contained in Sections 7(d) and 7(e) of the Act, 29 U.S.C. 626(d) and (e), not in Section 14(b), 29 U.S.C. 633(b). Section 7(d) of the ADEA is the counterpart of Section 706(e) of the Civil Rights Act and Section 14(b) is the counterpart of Section 706(c) of the Civil Rights Act. Because the limitation provisions in Sections 7(d) and (e) of the ADEA "adequately protect defendants against stale claims," the Court declined to "attribute to Congress an intent through § 14(b) to add to these explicit requirements by implication"—in that case, by reading Section 14(b) of the ADEA to command compliance with state statutes of limitations in deferral states as a prerequisite to bringing a private action under the ADEA. 441 U.S. at 762-763. In the present case, it would be equally inappropriate to attribute to Congress an intent, this time through Section 706(c), to add to the explicit 300-day limitations provision in Section 706(e) the implicit requirement that the charge be filed with the State no more than 240 days after the alleged discriminatory act.

Moreover, the plaintiff in *Oscar Mayer & Co.* v. *Evans* had never filed a complaint with the state agency prior to filing an action in federal court. But, despite the language in Section 14(b) of the ADEA

that "no suit shall be brought" before expiration of the 60-day deferral period, the Court held that the plaintiff could still comply with the 60-day deferral requirement in Section 14(b) by filing a complaint with the state agency, even though the two-year limitations period in Section 7(e) for bringing an action under the ADEA had expired. The Court held only that the state agency "must be given an opportunity to entertain respondent's grievance before his federal litigation can *continue*" and that his federal action should be "held in abeyance" while he pursued state remedies (441 U.S. at 764; emphasis added).

Section 14(b) of the ADEA is "virtually *in haec verba*" with Section 706(c) of the Civil Rights Act (*Oscar Mayer & Co.* v. *Evans, supra,* 441 U.S. at 755). Thus, in a Title VII action, the comparable language in Section 706(c) that "no charge may be filed" with the EEOC before expiration of the 60-day deferral period must mean only that the state agency "must be given an opportunity to entertain respondent's grievance before his federal [administrative procedure] can *continue,*" and that the EEOC processing may properly be "held in abeyance" (*id.* at 764)—or as the Court stated in *Love* v. *Pullman Co.* (404 U.S. at 526), held in "suspended animation"—until the 60-day period for deferral to state administrative procedure has expired. And just as in the ADEA action involved in *Oscar Mayer,* it does not matter that the deferral to state proceedings is completed after the close of the applicable federal limitations period.

Finally, here, as in *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526, petitioner "makes no showing of prejudice to its interests" resulting from the procedures used to process respondent's claim. The EEOC notice to petitioner on August 20, 1976,[7] alerted petitioner to respondent's claim, thereby serving the purpose of the limitations provision by giving petitioner "an opportunity to gather and preserve evidence in anticipation of a court action." *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 372.

C. Administrative Practice

Not surprisingly, in view of the language and purposes of Sections 706(c) and (e), the EEOC has at all times treated as effective and timely a federal charge submitted at any point during the 300-day period allowed by Section 706(e) in deferral states, even though the 60-day deferral period would not expire until more than 300 days from the date of the discriminatory occurrence. This interpretation of the present Sections 706(c) and (e) was first

[7] Section 706(e) provides that notice of a charge shall be furnished to the person against whom the charge is filed within 10 days of the filing. In view of the EEOC's regulation, 29 C.F.R. 1601.13(a), providing that the timeliness of a charge for purposes of Section 706(e) shall be measured from the time of the EEOC's receipt of the charge, notice in this case should have been furnished to petitioner within 10 days of the EEOC's receipt of respondent's charge on June 15. However, the legislative history of the 1972 amendments makes clear that the failure to give notice to the person charged is not to affect the rights of the complainant (see Section-by-Section Analysis, 118 Cong. Rec. 7167, 7564 (1972)).

formally included in 1968 in the very same regulation which set forth the policy, approved by the Court in *Love* v. *Pullman Co.*, *supra*, of referring a charge to the state agency on behalf of the aggrieved person and automatically regarding it as "filed" 60 days later. 29 C.F.R. 1601.12(b)(iii) and (v), as added, 33 Fed. Reg. 16409 (1968).[8]

To be sure, the published regulations have not always described that result in the same way. When the present proceedings were instituted, the EEOC regulation provided that when a federal charge is submitted in circumstances where the 60-day deferral period would not expire before 300 days after the act complained of, the EEOC would "consider the

[8] This regulation was promulgated both "to give full weight to the policy of section 706(b) [now 706(c)] of the Act which affords State and local fair employment practice agencies * * * an opportunity to resolve disputes involving alleged discrimination concurrently regulated by Title VII of the Civil Rights Act of 1964 and State or local law" and "to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights." 29 C.F.R. 1601.12(a), 33 Fed. Reg. 16408-16409 (1968). The EEOC noted that it was its experience "that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of the protection of the Act" (*ibid.*), and the regulation was promulgated to resolve these complexities and potential ambiguities.

Section 706(d) of the Act as originally enacted in 1964—the predecessor to the present Section 706(e)—allowed up to 210 days to file with the EEOC in a deferral state. The regulation issued in 1968 accordingly provided that a charge received within 210 days is timely.

charge to be filed" on the 300th day. 29 C.F.R. 1601.12(b)(1)(v)(A) (1977); see Pet. App. A14, A34 n.20. Today, revised regulations explicitly provide that timeliness for purposes of Section 706(e) shall be gauged by the date of the EEOC's *receipt* of a charge (29 C.F.R. 1601.13(a) (1979)), but that the EEOC's assumption of jurisdiction over the case shall await the expiration of the 60-day deferral period, unless the state agency terminates proceedings sooner (29 C.F.R. 1601.13(d)(2)(iii) (1979)).[9]

[9] Actually, even prior to 1978, EEOC regulations contained two separate sections addressing the filing of complaints. One provided that "a charge is deemed filed when the Commission receives from the person aggrieved a written statement" setting forth the allegations. 29 C.F.R. 1601.11(b) (1970), discussed in *Love* v. *Pullman Co., supra,* 404 U.S. at 524 n.2, 526 n.5. A separate section provided that where the 60-day deferral period would expire more than 300 days after the alleged discriminatory act, the charge would be deemed filed on the 299th or 300th day, and the EEOC would commence processing on that date. See 29 C.F.R. 1601.12(b)(1)(v), as amended, 37 Fed. Reg. 9216 (1972); 29 C.F.R. 1601.12(b)(1)(v)(A) as amended, 40 Fed. Reg. 3210N (1975); see also 29 C.F.R. 1601.12(b)(1)(v), as added, 33 Fed. Reg. 16409 (1968).

The present regulations, providing that a charge is deemed filed when received for purposes of Section 706(e) but that the EEOC will not "assume jurisdiction" until the state has had 60 days to consider the allegations, merely clarified these sections and worked no change as a practical matter. For purposes of satisfying the requirement in Section 706(e) that a charge be filed with the EEOC within 300 days, it matters little whether the charge is formally deemed filed when received or subsequently, on the 299th or 300th day. Although the prior regulations provided that the EEOC would begin processing a charge when it was deemed automatically filed on the 299th or 300th day, even though the 60-day deferral

The upshot is that, in a deferral State, the Commission has always treated as effective for purposes of the limitations provision a charge submitted to it within 300 days of the discriminatory conduct, even though the 60-day deferral period would not expire until after the 300 days had elapsed. On this issue, the EEOC "has not wavered from its general understanding of its powers and the extent to which their exercise is consistent with the goals of the Act." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, No. 78-1651 (Feb. 20, 1980), slip op. 22-23. As this Court has

period had not yet expired, it is unlikely that this was often done in view of the EEOC's extensive backlog of cases. See *Occidental Life Insurance Co.* v. *EEOC, supra,* 432 U.S. at 369-371. EEOC regulations no longer admit of such an interpretation, and, in any event, respondent's charge in the present case was not processed by the EEOC until after the New York Human Rights Division had 60 days to investigate it (Pet. App. A6-A7).

Petitioner argues (Br. 10-11) that language in *Love* v. *Pullman Co., supra,* discussing the EEOC's regulation providing that a charge is filed when received supports its position herein. The Court stated that the "statutory prohibition of § 706(b) against filing charges that have not been referred to a state or local authority necessarily creates an exception to the regulation requiring filing on receipt [29 C.F.R. 1601.11(b)]." 404 U.S. at 526 n.5. We agree that then-Section 706(b) created an exception to the regulation providing that a charge is filed when received by preventing the EEOC from *processing* the charge until the deferral period of up to 60 days has passed, and the EEOC's regulations now make this clear. See 29 C.F.R. 1601.13(d)(2)(iii), (iv) and (v). In view of the fact that the Court was addressing the court of appeals' concern that the *Commission* might manipulate filing dates (see 404 U.S. at 525), we do not read footnote 5 in *Love* to intimate anything more.

repeatedly held, such a consistent and longstanding interpretation by the EEOC of the requirements of Title VII is entitled to "great deference." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *McDonald* v. *Sante Fe Trail Transp. Co.*, 427 U.S. 273, 279-280 (1976); *Oscar Mayer & Co.* v. *Evans, supra,* 441 U.S. at 761.

D. The 1972 Amendments

The present Sections 706(c) and (e) were enacted as part of the 1972 amendments to Title VII of the Civil Rights Act of 1964. As explained below, when it enacted these provisions in 1972, Congress expressly approved the interpretation of the predecessor Sections 706(b) and (d) under which a charge was regarded as filed in a timely fashion with the EEOC even though the 60-day deferral period would expire after the statutory period for filing with the EEOC. "When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 134 (1978). See also *Don E. Williams Co.* v. *Commissioner*, 429 U.S. 569, 576-577 (1977). This principle has been applied to the 1972 amendments to Title VII. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975).

Section 706(b), as originaly enacted in 1964, 42 U.S.C. (1970 ed.) 2000e-5(b), provided that "no charge may be filed" before expiration of the 60-day

deferral period, just as the present Section 706(c) does. But the prior Section 706(d) was worded differently from the present Section 706(e). Section 706(d), 42 U.S.C. (1970 ed.) 2000e-5(d), stated that a person had up to 210 days to file in a deferral state if he "has followed the procedure set out in subsection (b)" for filing with a state agency. The reference to subsection (b) and the express requirement that the complainant have "followed" the procedure set out in that subsection might conceivably have been thought to reflect an intent that *completion* of the 60-day deferral period in that subsection was to be a precondition to the formal "filing" of a charge under Section 706(d) (see *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 824 n.33 (7th Cir. 1972))—although, as noted above, the EEOC never interpreted the prior Section 706 in this manner.

In 1971 the House and Senate Committees both reported bills to amend Title VII that would have made identical changes in what are now Sections 706(c) and (e). Both would have deleted from the present Section 706(c) the provision that "no charge shall be filed" before expiration of the state deferral period and stated instead that "the Commission shall take no action with respect to the investigation of such charge" until the expiration of the 60-day period. S. Rep. No. 92-415, 92d Cong., 1st Sess. 56 (1971); H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 43 (1971). The Senate Report explained the significance of this change:

> This provision retains the present requirement that the Commission defer for a period of 60 days to State or local agencies functioning under appropriate anti-discrimination laws (or 120 days during the first year after the effective date of such law). The only change in the present law is to delete the phrase "no charge may be filed" with the Commission by an aggrieved person in such State or locality. The present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State, or local agency. The new language clarifies the present statute by permitting the charge to be filed but prohibiting the Commission from taking action with respect thereto until the prescribed period has elapsed.

S. Rep. No. 92-415, *supra*, at 36; see also H.R. Rep. No. 92-238, *supra*, at 27.

The bills reported by the House and Senate Committees made a corresponding change in what is now Section 706(e). Each bill deleted the reference in the prior Section 706(d) to subsection (b) and the provision that a complainant in a deferral state has an extended period to file with the EEOC if he "has followed" the procedures for filing with the state. Both committee bills substituted instead the language, eventually enacted, that a complainant has up to 300 days to file with the EEOC if he "initially instituted" state proceedings. The apparent purpose of this change was to indicate that a charge could be filed with the EEOC anytime within 300 days as long as state proceedings were commenced within the 300-

day period, and thereby to correspond the language in Section 706(e) to the change in Section 706(c) expressly permitting a charge to be filed with the EEOC before the state procedures had been invoked but barring the EEOC from acting on the charge before expiration of the 60-day deferral period. The Senate Report expressly states that "subsection [(e)] prescribes the time limits for the filing of a charge" (S. Rep. No. 92-415, *supra*, at 36), in contrast to the description of subsection (c) as retaining the requirement "that the Commission defer for a period of 60 days to State or local agencies" (*ibid.*). There is no suggestion that the time limits Section 706(e) "prescribes" are implicitly modified by the deferral provision in Section 706(c).

The proposed Sections 706(c) and (e) generated no controversy during the floor debates. For reasons unrelated to these sections, the full House adopted a substitute bill in lieu of the committee bill.[10] The substitute bill adopted on the House floor would have made no changes in the prior Section 706(b), and would have amended the prior Section 706(d) to allow up to 180 days to file with the EEOC where there

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[10] The significant controversy on the 1972 amendments centered around the provision in each committee bill giving the EEOC cease-and-desist powers. The House and Senate each adopted a substitute for its respective committee bill that deleted the cease-and-desist provisions and provided instead for the EEOC to sue in federal court. See generally *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 361-365.

was no state agency but retained the 210-day limitations period for filing with the EEOC where the person aggrieved "has followed" the procedures set forth in Section 706(b) for deferral states. See H.R. 1746, 92d Cong., 1st Sess. (1971), reprinted in Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, 326-332 (Comm. Print 1972) (Leg. Hist.). There was no discussion during the House debates of these features of the substitute bill, and adoption of the substitute bill cannot, therefore, be taken as a considered rejection of the substance of the corresponding provisions of the committee bill. In any event, because the House bill allowed only 30 more days to file with the EEOC in deferral states than in non-deferral states, it is clear that the House bill could not have been intended to require that the 60-day deferral period be exhausted before a charge could be regarded as "filed" with the EEOC for purposes of Section 706(e).

The bill passed by the Senate, in contrast, retained the committee's version of Sections 706(c) and (e), providing that the EEOC could file but could "take no action" on a charge received before expiration of the 60-day deferral period and that the 300-day period was available to a complainant who had "initially instituted" state proceedings. Leg. Hist. 1781. The bill approved by the Conference Committee and eventually enacted contained new subsections (a) through (g) of Section 706 (H.R. Conf. Rep. No. 92-

899, 92d Cong., 2d Sess. 2-6 (1972); S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. 2-6 (1972); Pub. L. No. 92-261, 86 Stat. 103, 104-107), as the Senate bill did, rather than a selective amendment of that section, as the House bill provided. Section 706(c), as reported by the Conference Committee, to an extent followed the House approach by reenacting the language of the prior 706(b).[11] Section 706(e), on the other hand, is drawn from the Senate bill. The legislative history conclusively demonstrates that Congress' willingness to "split the difference" between the House and Senate bills stemmed from two intervening judicial decisions that conformed to its intent as to how the procedural requirements in Section 706 should be interpreted.

On January 17, 1972, this Court announced its decision in *Love* v. *Pullman Co.*, *supra*, approving the EEOC's policy of referring charges to a state on a complainant's behalf. On February 18, 1972, the Tenth Circuit held in *Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222, 1224, that a charge filed with the EEOC during the 60-day deferral period did "serve to meet the jurisdictional requirement" of the prior Section 706(d), even where the 60-day deferral period expired after the 210-day period then allowed for filing with the EEOC in deferral states.

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[11] However, the House bill would have left the prior Section 706(b) unamended, rather than reenacting it. This distinction is significant. See pages 36-38, *infra*.

The Conference Committee explained its action as follows:

> The Senate amendment contained two provisions allowing the Commission to defer to state and local equal employment opportunity agencies. It deleted the language of existing law providing that no charge may be filed during the 60-day period allowed for the deferral and substituted a provision prohibiting the Commission from acting on such a charge until the expiration of the 60-day period. The House bill made no change in existing law. The Senate receded with an amendment that would re-state the existing law on the deferral of charges to state agencies. The conferees left existing law intact with the understanding that the decision in *Love* v. *Pullman*, —— U.S. —— (February 7, 1972) interpreting the existing law to allow the Commission to receive a charge (but not act on it) during such deferral period is controlling.
>
> Both the House bill and the Senate amendment provided that charges be filed within 180 days. The Senate allowed an additional 120 days if a charge is deferred to a state agency and the House allowed only 30 additional days. The Senate amendment required that notice of the charge be served in 10 days. The House bill provided that charges under Title VII are the exclusive remedy for unlawful employment practices. The House receded.

S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. 17 (1972); H.R. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. 17 (1972). Thus, it is clear that Congress intended the Section 706(c) it enacted in 1972 to authorize the EEOC to file (but not act on) a complaint during the deferral period, just as the Senate bill expressly provided.[12] This interpretation is confirmed by the decision of the House conferees to recede to the Senate's new language in Section 706(e), which provides that a charge is timely if state proceedings have been "initially instituted" within the 300 day limitations period.

This understanding is made even more explicit in Senator Williams' Section-by-Section analysis of the bill reported by the Conference Committee—a document this Court has characterized as the "final and conclusive confirmation" of the meaning of the 1972 amendments (see *Occidental Life Insurance Co.* v. *EEOC*, *supra*, 432 U.S. at 365). In explaining the new Sections 706(c) and (d) the analysis provided:

> No change in these provisions was deemed necessary in view of the recent Supreme Court decision of *Love* v. *Pullman Co.*, —— U.S. ——, 92 S.Ct. 616 (1972) which approved the present EEOC deferral procedures as fully in compliance with the intent of the Act. That case held that the EEOC may receive and defer a charge to a State agency on behalf of a complainant and begin to process the charge in the EEOC upon lapse of the 60-day deferral period, *even though*

[12] The critical point, of course, is what Congress understood the import of the *Love* decision to be, for it is that understanding that constitutes the legislative intent pertaining to Section 706(c) and (e). It does not matter for present purposes whether this Court or other courts would read *Love* in the same manner.

the language provides that no charge can be filed under section 706(a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. Similarly, the recent circuit court decision in *Vigil* v. *AT&T*, —— F.2d ——, 4 FEP Cases 345 (10th Cir. 1972), which provided that in order to protect the aggrieved person's right to file with the EEOC within the time periods specified in section 706(c) and (d), *a charge filed with a State or local agency may also be filed with the EEOC during the 60 day deferral period, is within the intent of this Act.*

118 Cong. Rec. 7167 (1972) (emphasis supplied). The same Section-by-Section Analysis was presented to the House. See 118 Cong. Rec. 7564 (1972).[13]

Thus, this is not a case in which Congress has declined to amend a section previously enacted with the expectation that the untouched section would be interpreted in a certain way. In that situation, as this Court has observed, the understanding or expectation of a later Congress does not necessarily control the interpretation of the statutory language, see, *e.g.*, *Oscar Mayer & Co.* v. *Evans*, *supra*, 441 U.S.

[13] It is instructive that the Section-by-Section Analysis equates the deferral procedures set forth in Section 706(c) and (d). For Section 706(d) provides that where an EEOC Commissioner, rather than the person aggrieved, files a charge, the EEOC, "before taking any action with respect to such charge," must afford a state or local agency a period of at least 60 days to consider it. Congress obviously intended the phrase "no charge may be filed" in Section 706(c) to be the equivalent of the requirement under Section 706(d) that the EEOC take no action during the deferral period.

at 758; *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977); *Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977), although such views are entitled to "significant weight," particularly if the intent of the enacting Congress is thought to be uncertain. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, *supra*, slip op. 23-24.

Here, Congress enated a *new* Section 706 in 1972. Although subsection (c) of that section contains language previously contained in subsection (b) of the Act as originally passed in 1964, "[i]t is the intent of the Congress that enacted [the version of Section 706 now in effect] * * * that controls" (*Teamsters* v. *United States*, *supra*, 431 U.S. at 354 n.39), not the intent of Congress in 1964. Thus, even if, contrary to our submission above, the 1964 Act could not reasonably be interpreted in the manner followed by EEOC since 1968,[14] Congress un-

[14] The Seventh Circuit's decision in *Moore* v. *Sunbeam Corp.*, *supra*, written by now Mr. Justice Stevens, is distinguishable on precisely this basis, even if it is viewed as correctly decided. On petition for rehearing, when the Conference Report and the Section-by-Section Analysis of the bill reported by the Conference Committee were called to the court's attention, the court stated that it did "not believe that those 1972 references can be used to shed any light on the proper interpretation of the 1964 legislation." 459 F.2d at 830. The court in *Moore* went further, however, and stated that the references in the 1972 legislative history could not be used "as evidence of what Congress might have done if *Vigil* had been decided differently" (*ibid.*). This observation is dictum, as the court did not have before it a question involving interpretation of the 1972 amendments.

The Seventh Circuit in *Moore* also noted that it could not accept the EEOC's procedure for filing a charge with the

equivocally expressed its intent with respect to the proper interpretation of the Section 706(c) and (e) it enacted in 1972, and that intent must control here.

E. Petitioner's Alternative Argument That a Complaint Must Be Filed With the State Agency Within 180 Days in a Deferral State Is Without Merit

Enough has been said to dispose of petitioner's alternative argument that Section 706(e) requires the person aggrieved to file with the state agency within 180 days as a prerequisite to invoking the procedures of the EEOC and bringing a private action in district court. There is simply nothing in the language or purposes of that section, which sets forth the limitations periods for filing with the *federal government*, to suggest that it also implicitly sets forth a statute of limitations for filing with the state. Cf. *Oscar Mayer & Co.* v. *Evans*, *supra*, 441 U.S. at 758-765.

In the present case, New York has a one-year statute of limitations for charges of discrimination. Respondent's charge of discrimination referred to the

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EEOC on the 209th day and then delaying processing for 60 days while the state is considering the matter, because this would be inconsistent with the provision permitting a complainant to go to district court in 60 days if the EEOC has not processed his complaint. 459 F.2d at 825 n.36, citing Section 706(e) of the original Act, 42 U.S.C. (1970 ed.) 2000e-5(e). But, whatever its merits under the original Act, the point is now mooted by the 1972 amendments, which, in addition to the changes already noted, extended the period for EEOC action on a charge of discrimination from 60 to 180 days. 42 U.S.C. 2000e-5(f)(1).

New York Human Rights Division by the EEOC on June 15, 1976, was therefore timely under state law. It would be inconsistent with Title VII's basic policy of deferral to state consideration of allegations of discrimination to interpret Section 706(e) in a manner that would require a complainant, as a condition to invoking his federal rights, to file a complaint with a *state* agency within a uniform, *federally imposed* limitations period of 180 days. If a state, on the basis of its familiarity with local employment conditions and state administrative procedures, chooses to establish a limitations period of more than 180 days for the filing of complaints with the state agency, no reason appears for interpreting Section 706(e) to require a complainant to forego his federal rights in order to avail himself of the longer limitations period —at least where the EEOC receives the charge and refers it to the state within the mandatory 300-day period Congress *has* established on a nationwide basis for invoking the protection of Title VII in de-

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[15] It is clear that a state may not foreclose resort to the EEOC by establishing a state limitations period of *less* than 180 days. *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1232-1233 (8th Cir. 1975); *Davis* v. *Valley Distributing Co.*, 522 F.2d 827, 832-833 (9th Cir. 1975). There is dictum in two appellate cases suggesting that a complaint must be filed with either the state or federal agency in all states within 180 days. *Olson* v. *Rembrandt Printing Co.*, *supra*, 511 F.2d at 1233; *Geromette* v. *General Motors Corp.*, 609 F.2d 1200, 1202 (6th Cir. 1979). But these cases involved state limitations periods of less than 180 days; there was no occasion for the court in either case to consider whether a complaint must be

ferral states.[15] Such an interpretation of Section 706(e) would, of course, create a powerful incentive for complainants to file with the state agency within 180 days, thereby needlessly frustrating the state's policy of allowing employees a longer period to file without serving any countervailing federal policy. For example, if a charge received by a state agency 240 or even 295 days after the alleged act of discrimination is disposed of by the state within the 300-day period provided in Section 706(e), there could be no serious contention that the policies underlying the imposition of a uniform federal limitations period have been undercut. Yet petitioner's argument would render such a complaint untimely for purposes of protecting federal rights.

Petitioner argues, however, that Section 706(e) expressly requires a complainant to file with the *EEOC* within 180 days where there is no state agency to

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filed with the state agency within 180 days even where, as here, the state has a limitations period of *more* than 180 days.

Moreover, because New York has a limitations period of more than 180 days and because respondent's charge was therefore timely under state law when filed on the 291st day, there is no need to consider here whether a charge filed more than 180 days after the alleged discriminatory act is adequate to extend the filing period for filing with the EEOC to 300 days in a state that does *not* have a limitations period of more than 180 days. In this regard, the EEOC's regulations provide for the processing of a charge received more than 180 days after the alleged discriminatory act only where the charge is still timely under state law. 29 C.F.R. 1601.13 (d) (2) (iii) (1979). However, this Court's decision in *Oscar Mayer & Co.* v. *Evans, supra,* suggests that compliance with state limitations periods of whatever duration is not required as a jurisdictional matter.

consider discrimination complaints and that the section must therefore be read to require a like filing with a state agency in deferral states. The additional 120 days allowed under Section 706(e) in deferral states, petitioner argues, were intended to permit the complainant to pursue whatever state administrative remedies he commenced during the first 180 days after the alleged discriminatory act. Quoting the Seventh Circuit's decision in *Moore* v. *Sunbeam Corp., supra,* 459 F.2d at 825 n.35, petitioner concludes (Br. 34) that "complainants in some states were [not] to be allowed to proceed with less diligence than those in other states." However, a complainant in New York or another state having a limitations period of more than 180 days is not permitted up to 300 days to file with the state as the result of an affirmative federal policy to require diligence of complainants in some states but not in others. The extended filing period merely results from the overriding policy in Section 706 of the Act to defer to state programs and procedures to the extent possible in resolving allegations of employment discrimination. If an aggrieved person is allowed up to 300 days to file with a state agency, that is the result of the longer limitations period adopted in that state, a result not prohibited by federal law.

Moreover, the EEOC's regulations have, since 1968, interpreted Section 706(e) and its predecessor to permit the person aggrieved to file a complaint within the federal limitations period of 300 (previously 210) days, whether or not he filed with the state within

the first 180 (previously 90) days. This longstanding and consistent interpretation of the filing requirements is, as we have noted above, entitled to great deference.

What is more, the complainant in *Vigil* v. *American Telephone & Telegraph Co.*, *supra*, had filed his complaint with the state agency more than 150 days after the alleged discriminatory act, and therefore beyond the initial 90-day limitations period provided in the prior Section 706(d). Thus, when Congress approved the holding in *Vigil* and expressed its intent that the *Vigil* holding control the interpretation of Section 706 as enacted in 1972, it necessarily intended that a charge of discrimination need not be filed with the state within 180 days in order for the person aggrieved to avail himself of the extended 300-day filing period in a deferral state.[16]

Finally, it is significant that the corresponding Section 7(d) of the ADEA allows a complainant the extended period of up to 300 days to file a notice of

[16] Petitioner relies (Br. 32-33) on a statement submitted by Rep. Dent at the time of the House's consideration of the Conference Report indicating that a complaint must be filed within 180 days in a deferral state. It is not apparent that Rep. Dent was aware that certain states had limitations periods of more than 180 days, see *Doski* v. *M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976). In any event, this statement by a member in one of the two Houses considering the Conference Report cannot overcome the clear expression of congressional decision to incorporate the result in *Vigil* as the authoritative intent of the Congress and the EEOC's longstanding administrative interpretation in accord with the result in *Vigil*. As noted above, the state complaint in *Vigil* was filed *after* expiration of the 90-day (now 180-day) period.

intent to sue with the Secretary in all "cases to which Section 14(b) applies." Section 14(b) of the ADEA, of course, contains the 60-day deferral period and therefore "applies" to all deferral states. Thus, the effect of the language in Section 7(d) of the ADEA is to extend the period for filing a notice of intent to sue with the Secretary of Labor to 300 days after the alleged discriminatory act on the sole ground that the act complained of occurred in a deferral state, regardless of when the person aggrieved first filed a complaint with the state agency. There is no reason to construe the corresponding provisions of Title VII any differently.[17]

[17] Should the Court conclude, contrary to our submission, either that a charge must be filed with the state agency within 180 days of the alleged discriminatory occurrence or that it must be filed within 240 days to allow the state up to 60 days to consider it before the charge can be deemed formally "filed" with the EEOC, that conclusion should not be applied to complainants, such as respendent herein, for whom the applicable deadline would have passed before the Court's decision was announced. Many complainants may have relied on the EEOC's longstanding interpretation of the Act, as embodied in EEOC regulations. The rationale for not applying the Court's holding to these complainants would be the same as the justification for tolling of a statute of limitations when necessary to do substantial justice. See *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974); *Oscar Mayer & Co.* v. *Evans*, *supra*, 441 U.S. at 759, 764-765 & n.13, and cases cited; *Crosslin* v. *Mountain States Tel. & Tel. Co.*, 400 U.S. 1004 (1971). Such a result is also supported by this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-109 (1971), in which the Court declined to apply retroactively a decision concerning the application of a statute of limitations.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Petitioner,

v.

RALPH H. SILVER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioner.[1]

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary non-profit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq.* ("the Act"), as well as other equal employment statutes and regulations. As such, they have a direct interest in the principal issues presented by the instant case—i.e., whether an EEOC charge filed between the 180th and 300th day following the occurrence of an alleged unlawful employment practice is timely under 42 U.S.C. § 2000e-5(e) where no proceedings were initially instituted before a "706 agency" within 180 days of the unlawful act, and whether a charge received by EEOC during the 60-day deferral period mandated by 42 U.S.C. § 2000e-5(c) may be considered as "filed" with the Commission despite the subsection's provision that no charge may be filed with EEOC "before the expiration of sixty days after proceedings

have commenced under a State or local law. . . ." See 42 U.S.C. § 2000e-5(c).[2]

STATEMENT OF THE CASE

Respondent Ralph H. Silver was terminated by the Petitioner, Mohasco Corporation, from his position as senior marketing economist on August 29, 1975. On June 15, 1976, 291 days after his termination, Silver submitted a letter to the Equal Employment Opportunity Commission alleging that during his thirteen-month tenure with the Corporation, he had been the target of harassment by Mohasco executives because of his Jewish beliefs. Under Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e),[3] an aggrieved individual must file a

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[2] Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as amicus curiae in a number of other recent cases in this Court raising important equal opportunity issues. *See, e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Great American Federal Savings & Loan Association* v. *Novotny*, 99 Sup. Ct. 2345 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); and *Kaiser Aluminum & Chemical Corp.* v. *Weber*, 99 S. Ct. 2721 (1979).

[3] 42 U.S.C. § 2000e-5(e) provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful

charge with the Commission within 180 days after the alleged unlawful employment practice occurred, unless proceedings have been initially instituted before a 706 agency within 180 days,[4] in which case the complainant has until the 300th day from the alleged unlawful act in which to file.

Using a Notice of Deferral Transmittal dated June 15, 1976, the Commission forwarded Silver's letter to the New York State Division of Human Rights ("NYSDHR"). Under Section 706(c) of Title VII 42 U.S.C. § 2000e-5(c), "no charge may be filed with [the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. . . ."[5] Ac-

employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

[4] Under 42 U.S.C. § 2000e-5(c), a "706 agency" is a state or local agency authorized to grant or seek relief from employment discrimination.

[5] 42 U.S.C. § 2000e-5(c) provides:

In the case of an alleged unlawful employment practice occuring in a State, or a political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, *no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated,* provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority. (Emphasis supplied.)

cordingly, EEOC's Notice of Deferral contained the statement that "[t]he Commission will automatically file this charge at the *end* of the deferral period. . . ." (Emphasis supplied.) *Silver* v. *Mohasco*, 19 FEP Cases 677, 681 (N.D.N.Y. 1978). By letter to Silver dated June 18, 1976, NYSDHR advised him of receipt of his letter to the EEOC and requested that he file a complaint with the Division within 30 days. Fifty-five days later, on August 12, 1976, Silver filed a verified complaint with NYSDHR setting forth allegations similar to those made in his original letter to the EEOC.

The 60-day deferral period having ended on August 14, 1976, EEOC notified Mohasco on August 20, 1976, that Silver had filed a charge against it alleging employment discrimination prohibited by Title VII. On February 9, 1977, the Human Rights Division issued its determination, subsequently upheld by the

New York State Human Rights Appeal Board on December 22, 1977, that there was no probable cause to believe that Mohasco had engaged in the unlawful discriminatory practice complained of by Silver. On August 24, 1977, the EEOC issued a similar determination that there was no reasonable cause to believe Silver had been subjected to unlawful employment discrimination and also issued to him a notice of right to sue.

Thereafter, on November 23, 1977, Silver brought this suit in the district court alleging that Mohasco had committed acts of employment discrimination against the Respondent in violation of Title VII. The Corporation having moved for summary judgment, the district court, on October 17, 1978, dismissed the complaint in its entirety for lack of subject matter jurisdiction holding that Silver had failed to make a timely filing of his charge with the EEOC as required by § 706. On July 13, 1978, a divided Court of Appeals for the Second Circuit reversed the District Court, holding that under § 706(e), Silver's charge had been timely filed with the EEOC. It also concluded that for purposes of determining whether a complainant has made a timely filing of a charge, a charge submitted to the EEOC during the 60-day deferral period is to be considered "filed" with the Commission upon its initial receipt, notwithstanding § 706(c)'s prohibition against any such charge being filed with the EEOC during that period.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act specifies with precision the procedures that complainants must follow in filing claims for relief from alleged unlawful

employment practices. Under Section 706(e), the Act's remedial scheme requires as a condition of use of Title VII remedies, that an employment discrimination charge be submitted to either the EEOC or a state 706 agency within 180 days of the occurrence of the unlawful act. If a complainant initially institutes proceedings with a 706 agency within the required 180-day period, then the subsection provides the aggrieved individual an additional 120 days in which to file a charge with the EEOC. The purpose of the 300-day extended filing period is to protect a complaint's right to pursue Title VII remedies where initial resort is made to state enforcement mechanisms.

The extended filing period, however, is not available to a complainant failing to make an initial filing with some agency, either federal or state, within 180 days. Most importantly, a claim barred by the 180-day filing limitation cannot be bootstrapped into federal jurisdiction by the filing of a charge with a 706 agency between the 180th day and the 300th day. The Second Circuit's conclusion that application of the 300-day extended filing period merely depends on whether the cause of action arose in a deferral state, not on whether a complainant initially filed with some agency within 180 days, is supported by neither the language of the subsection itself nor its legislative history. Moreover, as the thrust of Section 706 is to encourage the early resolution of discrimination complaints through the prompt filing of claims, Congress did not intend that complainants in states having a 706 agency were to be allowed to proceed less diligently than those in states without such an agency. Rather, it was the intention of Congress in fashion-

ing Section 706(e) to require all complainants, no matter where they reside, to make an initial filing with either the EEOC or a state 706 agency within 180 days of the occurrence of the discriminatory act.

Section 706(c), as does Section 706(e), provides another precise rule governing the filing of employment discrimination claims. Intended to insure prior resort to 706 agencies, the subsection prohibits a charge from being filed with the EEOC before the expiration of sixty days after proceedings have been commenced before a 706 agency, unless such proceedings have been earlier terminated. Because the subsection prohibits a charge from being filed with the EEOC during the period in which a 706 agency has exclusive jurisdiction over the claim, charges submitted to the Commission during that period are held in suspended animation until the conclusion of the deferral period, at which time they are automatically filed. As no charge may be filed for purposes of Section 706(e) until the conclusion of the deferral period, the Second Circuit incorrectly concluded that a charge submitted to the EEOC during that period is to be considered as "filed" upon initial receipt. Its decision to ignore the precise words of the statute was improper in light of the refusal of Congress during consideration of the 1972 Civil Rights Act amendments to accept an amendment permitting such charges to be filed during the deferral period.

Accordingly, the district court properly granted Mohasco's motion for summary judgment on the ground that the court lacked subject matter jurisdiction as Silver had failed to make a timely filing with either the EEOC or the NYSDHR within 180 days of his discharge. Secondly, even if this Court

were to hold that the locus of the cause of action is the sole determinant in the decision as to whether the 300-day extended filing period applies to a timeliness question, Silver nevertheless failed to make a timely filing with the EEOC. Section 706(c) prevented the charge that he had submitted to the EEOC on the 292nd day following his discharge from being filed for purposes of Section 706(e) until the 352nd day after the alleged discriminatory act, long after the 300th day statutory filing limit.

ARGUMENT

I. An Unlawful Employment Practice Charge Not Filed With Either the EEOC or a 706 Agency Within 180 Days of the Alleged Act Must Be Dismissed as Untimely Under Section 706.

A. *A Charge Filed With the EEOC Less Than 300 Days But More Than 180 Days After the Alleged Unlawful Employment Practice Occurred Is Not Timely Where the Complainant Failed to Institute Proceedings Initially With a 706 Agency Within 180 Days.*

As Title VII of the Civil Rights Act of 1964 "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit . . .," *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), Section 706(e) of the Act provides a simple rule for the resolution of timeliness questions arising under the statute. If a person claiming employment discrimination intends to rely on the remedial scheme established by the Act, then "a charge must be filed with the EEOC within 180 days of the alleged violation of Title VII. . . ." *Occidental Life Insurance Co. of Calif.* v. *EEOC*, 432 U.S. 355, 371-372 (1977); 42 U.S.C. § 2000e-5(e);

accord, Chapman v. *Pacific Telephone & Telegraph Co.*, 456 F. Supp. 65, 71-72 (N.D. Cal. 1978); *Ashley* v. *Goshen Community Schools Corp.*, 461 F. Supp. 22 (N.D. Ind. 1978), *aff'd*, 588 F.2d 839 (7th Cir. 1978). *See Keyse* v. *California Texas Oil Corp.*, 442 F. Supp. 1257, 1258 (S.D.N.Y.), *aff'd*, 590 F.2d 45 (2nd Cir. 1978); *Johnson* v. *Host Enterprise*, 19 FEP Cases 1315 (E.D. Pa. 1979).

The sole exception to the 180-day rule for filing with EEOC concerns those instances in which a complainant, before seeking redress through Title VII remedies, institutes proceedings before a state or local agency authorized to provide relief from such discrimination. Where an individual has "initially instituted" proceedings before such an authority within 180 days of the occurrence of the alleged unlawful employment practice, the complainant's charge need not be filed with the EEOC until the 300th day following the occurrence of the act. 42 U.S.C. § 2000e-5(e). If, however, the complainant fails to file a charge with *either* the EEOC or a 706 agency within 180 days of the discriminatory act, but waits until some time between the 180th and 300th day before instituting proceedings, the charge for purposes of Title VII remedies is untimely regardless of whether the state has a 706 agency. *Id.; Olson* v. *Rembrandt Printing Company*, 511 F.2d 1228 (8th Cir. 1975) (*en banc*); *Rodriguez* v. *Southern Pacific Transportation Company*, 587 F.2d 980 (9th Cir. 1978); *Geromette* v. *General Motors Corporation*, 21 FEP Cases 649, 21 EPD ¶ 30,424 (6th Cir. 1979); *Wiltshire* v. *Standard Oil of California*, 447 F. Supp. 756 (N.D. Cal. 1978); *Bittner* v. *Combustion Engineering*, 19 FEP Cases 1295 (N.D. Cal. 1979); *Mills* v. *National Distillers*

Products Co., 435 F. Supp. 72, 74-75 (S.D. Ohio 1977). *See, Occidental Life Insurance Co. of Calif.* v. *EEOC, supra*, 432 U.S. 359, n. 8; *Domingo* v. *New England Fish Co.*, 445 F. Supp. 421, 427 (W.D. Wash. 1977). In other words, a claim barred by the 180 day filing limitation found in Section 706(e) cannot be bootstrapped into federal jurisdiction by the filing of a charge with a 706 agency before the 300th day. *Id.*; *Mobley* v. *Acme Markets, Inc.*, 20 FEP Cases 620 (D. Md. 1979). Rather, Section 706(e) requires a complainant to institute proceedings with *some* agency, either state or federal, by the 180th day. The court of appeals for the Eighth Circuit sitting *en banc* in *Olson* v. *Rembrandt Printing Company*, 511 F.2d 1228, 1233, correctly explained Section 706(e) as requiring that:

> [A] charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferral state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal Act.[6]

Applying the rule of Section 706(e) to the instant case, it is clear that Silver failed to make a timely filing with the EEOC. His charge, filed with the Commission less than 300 days but more than 180 days

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[6] A prior Eighth Circuit panel decision written by Judge Stephenson, *Richard* v. *McDonnell Douglas Corporation*, 469 F.2d 1249 (8th Cir. 1972), reached a different conclusion. However, the Eighth Circuit sitting *en banc* in *Olson* refuted its decision in *Richard. Olson, supra*, 511 F.2d at 1233.

after the alleged unlawful employment practice occurred, was not timely, as the complainant failed to institute proceedings initially with the NYSDHR within the 180 day period required by 42 U.S.C. § 2000e-5(e).[7]

Silver, however, argues that the applicability of the 300-day exception depends on the locus of the alleged discriminatory act, not on whether the complainant initially instituted proceedings with a 706 agency during the prescribed 180-day period. He asserts that if the locus is in a state with a 706 agency, then a complainant has 300 days (or until 30 days after the termination of state proceedings, whichever is earlier) in which to file a charge of employment discrimination with the EEOC. Conversely, if the locus of the unlawful act is in a state *not* having a 706 agency, then the complainant would be denied the 300-day filing exception. Accordingly, those charging parties in nondeferral states would have 180 days in

[7] Other courts have adopted contrary interpretations of § 706(e) without fully setting forth their reasons for doing so. *See Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Ugiansky* v. *Flynn and Emrich Company*, 337 F. Supp. 807 (D. Md. 1972); *Ashworth* v. *Eastern Airlines, Inc.*, 389 F. Supp. 597 (E.D. Va. 1975); *Ortega* v. *Construction & General Laborers' Union No. 390*, 396 F. Supp. 976 (D. Conn. 1975). *Lo Re* v. *Chase Manhattan Corp.*, 431 F. Supp. 189 (S.D.N.Y. 1977), relied on a more thorough discussion found in *Doski* v. *M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976). For the reasons cited above, the language of the statute itself, its legislative history, as well as important policy considerations, require the conclusion that a complainant must file an employment discrimination charge with either a state or local agency or the EEOC within 180 days of the unlawful act.

which to "initially institute" proceedings, whereas those in deferral states would have 300 days in which to do so. Such a strained interpretation of Section 706(e) is not supported by either the words of the subsection itself or its legislative history.

B. *The Legislative History Demonstrates That Congress Intended That a Charge Be Filed With the EEOC or a 706 Agency Within 180 Days of the Occurrence of the Unlawful Act as a Precondition to Use of Title VII's Enforcement Scheme.*

Analysis of the legislative history of Section 706 provides conclusive evidence that the "extended filing period was not intended as a bonus for complainants residing in a deferral state, but as a means of effecting an accommodation between the federal right and the requirement of pre-amendment § 2000e-5(b) of initial resort to an available state or local agency." *Olson* v. *Rembrandt Printing Company*, 511 F.2d 1228, 1233; *accord, Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 825, n. 35 (7th Cir. 1972) (Stevens, J.).[8] As states were to have a "prior opportunity to consider discrimination complaints . . .," *Love* v. *Pullman Company*, 404 U.S. 522, 526 (1972), Section 706(e) was fashioned "to give the state agency an initial opportunity to process the claim without jeopardizing the federal right. . . ." *Olson* v. *Rembrandt Printing Company, supra*, 511 F.2d 1128, 1232.

[8] This Court stated in *Oscar Mayer & Co.* v. *Evans*, 99 Sup. Ct. 2066, 2071 (1979) with respect to Section 706, "[b]ecause state agencies cannot even attempt to resolve discrimination complaints not brought to their attention, the section has been interpreted to require individuals in deferral states to resort to appropriate state proceedings before suit under Title VII." (Footnote omitted.)

Passage of the 1964 Civil Rights Act was made possible by the Dirksen-Mansfield compromise over such provisions as those governing time limits for filing claims.[9] This compromise, subsequently approved by both chambers,[10] contained an enforcement procedure imposing "an extremely short limitations period and [requiring] . . . resort to state procedures, where available, as a condition precedent to a private action. . . ." *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 821 (7th Cir. 1972). According to the explanation of the compromise given by Senator Dirksen, 110 Cong. Rec. 12819 (1964):

> New subsection (d) [now (e)] requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in subsection (b) [now (c)], he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier.

[9] According to the U.S. Equal Employment Opportunity Commission, 1 Legislative History of Titles VII and XI of Civil Rights Act of 1964 3001 (hereinafter, "1964 Legislative History"):

> The Title VII provisions that were adopted by the House and that were the subject of extensive discussion in the report of the House Judiciary Committee were modified substantially in the substitute measure adopted in the Senate. The substitute bill did not go through the usual committee procedure. Instead, it was hammered out in informal bipartisan conferences, with Majority Leader Mansfield (D., Mont.), Minority Leader Dirksen (R., Ill.), and Senators Humphrey (D., Minn.) and Kuchel (R., Calif.) as the principals. As a result, there was no committee report on the Senate bill. Moreover, since the House then voted to accept the Senate bill without change, there was no Senate-House conference report.

[10] *See* 1964 Legislative History at 10, 11.

Senator Dirksen concluded by emphasizing that "[t]he additional 120 days is to allow him to *pursue* his remedy by State or local proceedings." (Emphasis supplied.)[11] *Id.* It was not intended to grant persons in deferral states who failed to meet the 180 day deadline an additional 120 days in which to *initiate* proceedings to remedy employment discrimination. Then-Judge Stevens' reading of the legislative history of the 1964 Act in *Moore* v. *Sunbeam Corp.*, *supra*, 459 F.2d at 825, n.35, led him to conclude that the "legislative history as a whole indicates a basic purpose to require a complainant to make his initial filing within 90 [now 180] days; the extension of the period to 210 [now 300] days in certain states was plainly intended to permit him to 'exhaust' the state procedures."

Further clarification of Congressional intent may be found in the legislative materials accompanying the 1972 amendments to the Civil Rights Act of 1964. Under those amendments, the language of the subsection governing the filing of charges was left

[11] Senator Humphrey added to the explanation of the compromise reached on § 706(d), now § 706(e), that the provision "is carefully worded to protect an individual who, in good faith, unnecessarily seeks to comply with the requirement of initial resort to State or local authority. Such a person will not lose his right to seek Federal relief simply because the 90-day period for filing with the Federal Commission has elapsed while he seeks to pursue State remedies." *Id.* at 3006.

substantially unchanged, except that the period for filing claims was expanded from 90 to 180 days, except where a complainant initially sought state or local remedies for unlawful discrimination, in which case, the individual was given 300 days in which to file a charge with the EEOC. A section-by-section analysis of the procedures approved by Congress relative to the filing of claims prepared by Rep. Dent, then the chairman of the General Subcommittee on Labor of the House Committee on Education & Labor,[12] contains the following explanation relative to § 706(e):

> Procedure Where No State Equal Employment Opportunity Law Exists
>
> (1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.
>
> * * * *
>
> Procedure Where State Equal Employment Opportunity Law Exists
>
> (1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice. 118 Cong. Rec. H 1863 (1972).

The explanation went on to discuss the exception to the 180 day filing rule that "if a charge is *initially filed* with a state or local agency, such charge must be filed with the Commission within 300 days after the alleged unlawful practice has occurred or within 30 days after receipt of notice that the state or local

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[12] The General Subcommittee on Labor was the legislation's jurisdictional subcommittee in the House of Representatives. *See,* C. Brownson, 1972 *Congressional Staff Directory* 314 (1972).

agency has terminated its proceedings."[13] (Emphasis supplied.)

Thus, it was the intention of those fashioning the statutory language to require as a condition of use of Title VII remedies "that a charge should be initially filed with *some* agency within 90 [now 180] days." *Wiltshire* v. *Standard Oil Co. of California, supra,* 447 F. Supp. at 759 (emphasis in original). Although the interpretation advanced by Silver may facilitate the filing of claims, it "would nullify the legislative compromise that made passage of the law possible in the first place." *Id.* at 760.

C. *The Fundamental Purpose of Section 706(e) Is to Encourage the Early Resolution of Employment Discrimination Claims no Matter Where They Arise, not to Permit Those in Deferral States to Proceed With Less Diligence Than Those in Other States.*

The extended filing period provided by Section 706(e) for those instances in which a complainant first institutes proceedings before a 706 agency protects the individual's right to pursue federal remedies if the state action provides insufficient redress. There is no reference in the legislative history indicating that Congress intended that "complainants in some states were to be allowed to proceed with less diligence than those in other states." *Moore, supra,*

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[13] According to *Wiltshire* v. *Standard Oil of California, supra,* 447 F. Supp. at 763, the Dent statement and the analysis of § 706 found at 118 Cong. Rec. 7565 (1972) mean "that the complainant must make his initial filing within the time provided, now 180 days; where the initial filing is with a 706 agency, the complainant has an additional 120 days to file with the EEOC."

459 F.2d at 825, n. 35. Rather, Section 706(e) encourages the settlement of employment claims at the state and local level by ensuring that those who initially sought relief through 706 agencies would not be foreclosed from federal remedies. Moreover, the prompt filing of employment discrimination claims with an agency whose enforcement scheme contemplates cooperation and voluntary compliance with antidiscrimination requirements encourages the settlement of disputes before attitudes have hardened and permanent changes have been made in the defendant's personnel structure. Congress established the EEOC not to "function simply as a vehicle for conducting litigation on behalf of private parties . . .," but as "a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." *Occidental Life Insurance Co. of Calif.* v. *EEOC*, *supra*, 432 U.S. at 368.[14] "[I]t cannot be gainsaid that conciliation and voluntary settlement are the preferred means for resolving employment discrimination suits." *United States* v. *Allegheny-Ludlam Industries, Inc.*, 517 F.2d 826, 846 (5th Cir.) *cert. denied*, 425 U.S. 944 (1975). One of the methods chosen by Congress to promote the

[14] *See, Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 472 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (purpose of filing requirement to enable EEOC to conciliate); *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) (purpose of bringing charge before EEOC to provide means for voluntary compliance and conciliation, expeditiously and inexpensively); *Smith* v. *Joseph Horne Co., Inc.*, 438 F. Supp. 1207 (W.D. Va. 1977) (prime objective of Title VII is to accomplish compliance with law through conciliation).

nonlitigious settlement of disputes was the provision of a deferral mechanism "to give state agencies a prior opportunity to consider discrimination complaints. . . ." *Love* v. *Pullman Company*, *supra*, 404 U.S. at 526. The method was not chosen in order that complainants in states having such agencies could proceed less expeditiously than those in states without such agencies. Clearly, the purpose of Title VII is to encourage, not delay, the resolution of employment discrimination claims.

If the parties are unable to settle their dispute voluntarily, however, prompt notice of the possibility of an enforcement action gives the defendant "an opportunity to gather and preserve evidence in anticipation of a court action." *Occidental Life Insurance Co. of Calif.* v. *EEOC*, *supra*, 432 U.S. at 372. Time limitation periods, therefore, "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). Congress saw six months as a sufficient period of time in which to initiate proceedings to remedy employment discrimination. Thus, in order to carry out the fundamental purposes of the Act through the prompt resolution of disputes, lower courts should not be permitted to broaden the limitations period mandated by Section 706(e) and thereby encourage delay in the filing of charges.

Moreover, Title VII permits a court to grant such forms of relief as job reinstatement, constructive or remedial seniority or "any other equitable relief as

the court deems appropriate." 42 U.S.C. § 2000e-5(g). Because the employment rights of persons other than those of a particular complainant, including the rights of persons who may be members of a group protected by Title VII, could well be affected by a remedial order, it is most important that the resolution of employment discrimination suits be accomplished before employment relationships have substantially altered. As stated in *Wiltshire* v. *Standard Oil of California, supra,* 447 F. Supp. at 759:

> Requiring all claimants to file within 180 days preserves the integrity of the short limitation period by imposing an equal duty of diligence on all claimants in asserting their federal claim, regardless of where they happen to live. There is no evidence in the legislative record that Congress intended to benefit claimants in a deferral state by giving them additional time in which to act on their claim simply because it arose in a state with a 706 agency. To permit claimants who happen to reside in such a state to file within 300 days while limiting claimants in non-deferral states to 180 days results in obvious and unwarranted inequity not likely to have been intended by Congress. Requiring everyone to file within 180 days removes that inequity and is entirely consistent with the statutory language.

It is undisputed that Silver failed to file a charge of employment discrimination against Mohasco with either the EEOC or the NYSDHR within 180 days of his discharge. For the reasons given above, the district court correctly determined that Silver had failed to make a timely filing as required by 42 U.S.C. § 2000e-5(e). Because failure to file a charge in a

timely manner requires that a charge be dismissed, *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968),[15] the district court correctly granted Mohasco's motion for summary judgment on the ground that Silver's failure to make a timely filing deprived the court of subject matter jurisdiction.

II. Where Proceedings Are Initially Instituted Before a 706 Agency, a Charge Received by the EEOC Is Not "Filed" for Purposes of 42 U.S.C. § 2000e-5(e) Until the Conclusion of the 60-Day Deferral Period, Unless the 706 Proceedings Are Earlier Terminated.

A. *A Charge Deferred to a 706 Agency for Initial Processing Cannot Be Treated as "Filed" With the EEOC Until the Conclusion of the 60-Day Deferral Period.*

As does its subsection (e), Section 706(c) of Title VII provides another simple procedural rule governing the filing of employment discrimination charges with the Equal Employment Opportunity Commission. Intended to insure prior resort to 706 agencies, the subsection requires that "no charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have

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[15] *Accord, Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064 (2d Cir. 1977); *Williams* v. *Norfolk & W. Railway Company*, 530 F.2d 539 (4th Cir. 1975); *Martin* v. *Georgia-Pacific Corp.*, 568 F.2d 58 (8th Cir. 1977). The timely filing of a charge is a jurisdictional precondition to commencement of court action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). As this court stated in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977): "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."

been commenced under the State or local law, unless such proceedings have been earlier terminated. . . ." 42 U.S.C. § 2000e-5(c). Because no charge may be filed with the Commission during the period in which the 706 agency has exclusive jurisdiction over the claim, if the EEOC receives a charge during that period, the Commission may "properly hold a complaint in 'suspended animation,' automatically filing it upon termination of the state proceedings." *Love* v. *Pullman Company*, 404 U.S. 525, 526 (1972); *accord, Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 823 (7th Cir. 1972) (Stevens, J.); *Gill* v. *Monroe County Dept. of Social Services*, 79 F.R.D. 316 (W.D.N.Y. 1978).[16] There can be no "filing" of a charge received by the EEOC during the initial 60-day period as Section 706(c) strips the EEOC of jurisdiction over the claim until the conclusion of the deferral period. *Nishiyama* v. *North American Rockwell Corp.*, 49 F.R.D. 288, 290-291 (C.D. Cal. 1970).

Although Title VII is a remedial statute often invoked by laypersons, the Second Circuit faulted the district court for insisting on a literal reading of the Act's procedural requirements. *Silver* v. *Mohasco*, 602 F.2d 1083, 1087 (2nd Cir. 1979). Rejecting his determination that the express language of Section 706(c) barred the filing of Silver's employment discrimination charge until the end of the deferral period, and that "a charge is 'filed' for purposes of

[16] *Gill, supra*, 79 F.R.D. at 332, held that "[u]nder EEOC's regulations, a copy of a complaint filed prematurely with the EEOC is properly referred to the state agency, and the complaint itself is deemed to be filed *after* the sixty-day waiting period expires or the agency proceedings terminate whichever occurs first." (Emphasis supplied.)

§ 706(e) when the state deferral period ends . . .," the appellate court relied on "its informed reading of Title VII, consistent with its purposes . . ." to conclude that Congress in drafting Section 706(c) for some reason used a phrase which, when read literally, conveyed the opposite of the intended meaning. *Id.*[17] We would submit, however, that "[t]here can be no more reliable an indication of legislative intent than the specific statutory words selected by

[17] The Second Circuit cited as support for its conclusion *Richard* v. *McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972); *Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); and *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972). For the reasons discussed herein, however, the Court of Appeals in the instant case should have affirmed the District Court's decision to adhere strictly to the language of §§ 706(c) and (e). Moreover, the approach taken in *Richard* was subsequently rejected by the Eighth Circuit sitting *en banc* in *Olson* v. *Rembrant Printing Company*, 511 F.2d 1228, 1233 (8th Cir. 1975). Also, *Anderson, Richard* and *Vigil* assume that the submission of a charge to the EEOC before deferral automatically "tolls" the § 706(e) limitations period. Whatever support there may have been for a tolling rationale, however, was severely undermined by *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). *See also Albano* v. *General Adjustment Bureau, Inc.*, 21 EPD ¶ 30,442 (S.D.N.Y. 1979). Moreover, the Sixth Circuit's recent decision in *Geromette* v. *General Motors Corp.*, 21 FEP Cases 649 (6th Cir. 1979) indicates that court's unwillingness to rely on the approach discussed in its prior *Anderson* opinion. Further, it has been held that equitable tolling is only appropriate relative to Section 706(e) if the complainant has been subjected to some form of affirmative misconduct which prevents a timely filing of a charge. *Chappell* v. *Emco Machine Works Company*, 601 F.2d 1295 (5th Cir. 1979). The facts of the instant case do not show any such misconduct.

Congress. . . ." *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696, 707 (5th Cir. 1973), *rehr'g denied*, 478 F.2d 1403, *cert. denied*, 415 U.S. 914 (1974). The proper statement of the filing rules contained in Sections 706(c) and (e) is that no charge may be "filed" for purposes of Section 706(e) until the conclusion of the state deferral period.

As discussed, Section 706(e) requires all claims of unlawful employment discrimination to be filed with an authority empowered to remedy such discrimination within 180 days of the occurrence of the unlawful employment practice.[18] When an aggrieved person initially institutes proceedings with a state or local authority within 180 days, the Act provides the complainant with an additional 120 days within which to file with the EEOC. During the first 60 days of the state processing of an employment discrimination claim, the EEOC is foreclosed from taking any action with respect to the claim unless the proceedings are earlier terminated. 42 U.S.C. § 2000e-5(c).

Section 706(e) was not fashioned to bar those pursuing state remedies from submitting a charge to EEOC during the 60-day deferral period, nor was the subsection intended to require claimants to refile the same charge or file a new charge with the Commission at the conclusion of the deferral period. *Love* v. *Pullman Company*, *supra*, 404 U.S. at 527. But as *Love* also demonstrates, Section 706(e) nonetheless prohibits a charge submitted within the 60-day period from being considered as "filed" until the end of that period. In *Love*, the plaintiff had submitted a letter to the EEOC alleging employment discrimination.

[18] *See*, pp. 9-21, *supra*.

While treating the letter as a complaint, the Commission refused to file a charge upon receipt in accordance with Section 706(c) [then Section 706(b)], but deferred the matter to the appropriate state 706 agency for processing. Upon the termination of the state proceedings, the case was referred back to the EEOC, which began investigating the allegations without receiving a new complaint from the plaintiff. When the employer sought to bar the plaintiff's suit in district court, this Court held that the plaintiff was not required by Section 706 to file a new complaint with the EEOC, as his original letter to the Commission was held in "suspended animation" until the conclusion of the deferral period, at which time it was automatically filed. As this Court stated in *Love*, 404 U.S. at 527:

> To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality.

Further support for the conclusion that Section 706(c) requires that no charge may be considered as filed with the EEOC before the end of the 60-day deferral period may be found in footnote 5 of this Court's opinion in *Love*. There, the Court quoted an EEOC regulation which provided that a charge is deemed filed when the Commission receives a statement from the aggrieved individual alleging unlawful employment discrimination. *Love*, *supra*, 404 U.S. at 526, *citing* 29 C.F.R. § 1601.11(b) (1971). Its reading of the statutory language, however, led the Court to conclude that:

> the statutory prohibition of § 706(b) [now (c)] against filing charges that have not been re-

ferred to a state or local authority *necessarily creates an exception to the regulation requiring filing on receipt. Id.* (Emphasis supplied.)

The suspended animation requirement of Sections 706(c) and (e) was followed by the district court in the instant case and was cogently argued by Judge Meskill in his dissenting opinion to the decision of the Court of Appeals. According to the district court, "it would appear to be clear that the plaintiff's charge could not have been immediately filed but must have been in 'suspended animation' status until 60 days after the proceeding was commenced before the Division of Human Rights . . . at which time plaintiff's charge would have been automatically filed by the EEOC." *Silver* v. *Mohasco Corp., supra,* 19 FEP Cases at 682. Then-Judge Stevens reached a similar conclusion in *Moore* v. *Sunbeam Corp., supra,* 459 F.2d at 826, in which he rejected the employer's argument that a charge received by EEOC and referred to a state agency must again be presented to the EEOC at the conclusion of the deferral period or upon the termination of the state proceedings. He reasoned, in reliance on the *Love* decision, that a charge received by EEOC is "automatically filed upon termination of the state proceedings or 60 days after initiation of the state proceedings, whichever is earlier." *Id.* at 823.[19] Similarly, in a decision preceding

[19] The court in *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972) also concluded that a charge is "not 'filed' within the meaning of the Act until expiration of the referral period, at which time it [becomes] automatically filed." Nevertheless, *Anderson* incorrectly concluded that a timely filing had been made relying on the

the *Love* case, *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889, 892 (2d Cir. 1971), *cert. denied*, 452 U.S. 918 (1972), a discussion was made of EEOC filing procedures relative to claims of employment discrimination deferred to State or local authorities:

> A copy of a complaint filed prematurely with the Commission is promptly transmitted to the appropriate local or state agency, while the complaint itself is held by the EEOC until termination of the local or state proceedings or the lapse of the 60-day statutory waiting period, whichever occurs first, and *then it is considered filed.* (Footnote omitted.) (Emphasis supplied.)

Silver, therefore, failed to make a timely filing of his charge for purposes of Section 706(e) for two reasons. As previously discussed, the filing requirements of Section 706(e) were not met because proceedings were initially instituted with neither the EEOC nor the NYSDHR within 180 days of his discharge. Moreover, even if this Court were to hold that persons residing in deferral states have 300 days in which to file regardless of whether proceedings were initially instituted within 180 days, Silver's charge did not meet the filing requirements of Section 706(e) for purposes of Title VII remedies. His initial filing was made on the 291st day following the alleged discriminatory act when his letter was referred to the appropriate 706 agency. Because Section 706(c) prohibits a filing with the EEOC until the conclusion of the deferral period, Silver's charge

tolling rationale discussed at footnote 18, *supra*. The continuing validity of *Anderson's* tolling rationale in the Sixth Circuit, however, is questionable in light of *Geromette* v. *General Motors Corp.*, 21 FEP Cases 649 (6th Cir. 1979).

in the form of his letter was held in suspended animation by the EEOC until 60 days had elapsed. The day after the deferral period expired—352 days after the Respondent's termination—the charge was filed, well beyond the limitations period mandated by Section 706(e). Accordingly, the district court properly held that Silver failed to make a timely filing of his charge.[20]

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[20] Silver also relies on an EEOC regulation, 29 CFR § 1601.12(b)(1)(v)(A) (1977), that provides:

> In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* that unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. . . ."

This regulation was found by the district court "to be contrary to the plain language of 42 U.S.C. § 2000e-5(c) . . ." as it would permit a complainant to circumvent the bar against filing charges with the EEOC during the 60-day referral period. 19 FEP Cases at 685. Where a federal agency promulgates regulations that fail to honor the clear meaning of a statute as revealed by its language, purpose and history, such regulations have no force or effect. *See Southeastern Community College* v. *Davis,* 99 Sup. Ct. 2361, 2369 (1979); *General Electric Company* v. *Gilbert,* 429 U.S. 125, 140-143 (1976).

B. *In Drafting Section 706, Congress Specifically Concluded That EEOC Could Not Assume Jurisdiction Over a Charge Before a 706 Agency Had the Opportunity to Resolve the Dispute.*

As stated in *Love,* holding a charge in suspended animation until the conclusion of the deferral period at which time it becomes automatically filed "complies with the purpose of both § 706(b) [now (c)], to give state agencies a prior opportunity to consider discrimination complaints, and of § 706(d) [now (e)], to ensure expedition in the filing and handling of those complaints." *Love, supra,* 404 U.S. at 526. Careful examination of the legislative history of Section 706 demonstrates that Congress clearly intended to vest exclusive jurisdiction of Title VII claims with state and local 706 agencies for an initial 60-day period. Only when that period ended did Congress intend that a complainant could initiate Title VII proceedings by filing a charge.

H.R. 7152 as reported by the House Committee on the Judiciary and subsequently approved by the House in 1963 contained no language relative to the deferral of employment discrimination claims to state and local authorities. *See,* H.R. REP. No. 914, 88th Cong., 1st Sess. (1963). When the measure bogged down in protracted Senate debate, deferral procedures were incorporated into the Dirksen-Mansfield compromise as a condition of Senate approval of the measure.[21] According to Senator Dirksen, "in cases where a state or local authority is authorized to remedy complaints of employment discrimination,

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[21] *See,* footnote 9, *supra,* p. 14.

§ 706(b), [now § 706(c)] requires that no charge may be filed with the Commission by the person aggrieved until 60 days . . . have been commenced under the State or local law." 1964 Legislative History at 3018.[22] The purpose of this subsection, he stated, was to keep "primary, exclusive jurisdiction in the hands of the State commissions for a sufficient period of time to let them work out their own problems at the local level." Remarks of Senator Dirksen, 110 Cong. Rec. 13087 (1964).[23] Because the managers of the legislation drafted Section 706 to encourage the settlement of employment discrimination claims without having to resort to federal remedies, "the individual complainant cannot file his charge with the Commission until the State or local agency has been given an opportunity to handle the problem under state or local law." Remarks of Senator Humphrey explaining the compromise to the Senate, 1964 Legislative History at 3003. *See Dubois* v. *Packard Bell Corporation*, 470 F.2d 973, 975 (10th Cir. 1972); *Voutsis* v. *Union Carbide Corp., supra*, 452 F.2d at 892 (statutory framework of Title VII embodies a federal man-

[22] Senator Humphrey stated with respect to the compromise that "Section 706(b) provides that in a state with a nondiscrimination law the individual must first follow State procedures for 60 days . . ." 1964 Legislative History at 3006.

[23] In *Oscar Mayer & Co.* v. *Evans*, 99 Sup. Ct. 2066, 2071, n. 3 (1979), this Court recognized that resort to appropriate state proceedings is mandatory. *See White* v. *Dallas Independent School District*, 566 F.2d 906 (5th Cir. 1978); and *Harris* v. *Commonwealth of Pennsylvania*, 419 F. Supp. 10, 13 (M.D. Pa. 1976) (valid charge is instituted before EEOC only when state authority has been afforded an adequate prior opportunity to consider the charge).

date to state action). This compromise, which subsequently became the Civil Rights Act of 1964, contains the same language governing the filing of claims subject to deferral to state 706 agencies as is presently found in 42 U.S.C. § 2000e-5(c).

When Congress made several changes in Title VII of the Civil Rights Act in 1972, it first considered, but then rejected, amending the deferral provision. The Senate Committee on Labor & Public Welfare initially determined that the deferral provision should retain "the present requirements that the Commission defer for a period of 60 days to State or local agencies functioning under appropriate anti-discrimination laws. . . ." S. REP. No. 415, 92nd Cong., 1st Sess. 36 (1971). The Committee went on, however, to propose the deletion of the phrase "no charge may be filed." *Id.* The Committee supported its proposal with the statement that:

> The present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language clarifies the present statute by permitting the charge to be filed but prohibiting the Commission from taking action with respect thereto until the prescribed period has elapsed.

The House took a far different approach to the deferral provision, concluding that no change in the subsection as drafted in 1964 should be made. *See* H.R. REP. No. 238, 92nd Cong., 1st Sess. 27 (1971). The bill subsequently approved by the House left the language of the deferral provision intact.

After discussion of the two approaches in the House-Senate conference on H.R. 1746, the Senate

amendment was rejected in favor of the House approach of leaving the deferral provision as it had originally been written. S. REP. No. 681, 92nd Cong., 2nd Sess. 17 (1972). According to the joint explanatory statement of the managers of H.R. 1746, this Court's decision in *Love* permitting the EEOC to receive a charge to be held in suspended animation until the conclusion of the 60-day deferral period at which time the charge would be filed, removed any ambiguity over the proper application of Section 706(c):

> The conferees left existing law intact with the understanding that the decision in *Love* v. *Pullman*, —— U.S. —— (February 7, 1972) interpreting the existing law to allow the Commission to *receive* a charge (but not to act on it) during such deferral period is controlling. *Id.* (Emphasis supplied.)[24]

[24] Instead of relying on the joint explanatory statement of the conference committee, the Second Circuit's opinion is grounded primarily on the views of a single member of the conference committee which are inconsistent with the explanatory statement. *See* 118 Cong. Rec. 7564 (1972), containing a "section-by-section" analysis of H.R. 1746 prepared by Sen. Williams. The weight to be accorded the Senator's statements was discussed by Judge Meskill in his dissent at 602 F.2d at 1094:

> [I]n 1972 Congress chose to leave the design and wording of the limitations subsection intact; the only changes made were a renumbering of the section and the lengthening of the two limitations periods contained therein. In my view, since the intent of the enacting Congress is unambiguous and the amending Congress chose to retain the original scheme, the evidence is insufficient to permit the inference that the later Congress intended to accomplish wholly new ends by leaving intact the scheme constructed by an earlier Congress which had different purposes in mind. *Oscar Mayer & Co.* v. *Evans*, [99 Sup. Ct. 2066, 1073] (1979).

H.R. 1746 and the conference report were then approved by members of the House and Senate. *See* United States Senate, Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 1853, 1872 (1972).

The Second Circuit, in its discussion of the legislative history, attempts to support its conclusion that Congress really did not intend the phrase "no charge may be filed" to communicate its literal meaning by citing as authority the Senate bill "designed to make explicit the construction we are adopting today." *Silver*, *supra*, 602 F.2d at 1089. In searching for Congressional intent, however, it would seem axiomatic that the statutory language adopted by Congress is a better guide than the language which was rejected. As this Court stated in *Gulf Oil Corporation* v. *Copp Paving Company*, 419 U.S. 186, 200 (1974), a deletion of a statutory provision by a conference committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." A similar rule of construction was proffered in *Pan American World Airways, Inc.* v. *CAB*, 380 F.2d 770, 781 (2d Cir. 1967):

> That Congress adopted the House version of the bill, specifically rejecting the Senate's conflicting version, is of course an extremely significant factor in determining what was Congress' intention with respect to the matters in issue.

Thus, to construe Section 706(c) as permitting a submitted charge to be filed during the 60-day deferral period in the face of explicit statutory language barring such a practice is a manifest distortion of legislative intent. This is especially true in light of the Congress' refusal to delete the phrase "no charge may be filed" in the 1972 amendments.

CONCLUSION

For the reasons cited above, the Amicus Curiae urges the Court to reverse the decision of the Court of Appeals for the Second Circuit below and sustain the district court's dismissal of Silver's claim as untimely under Sections 706(c) and (e) of the Civil Rights Act of 1964.

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